91-529

No. 91-

Supreme Court, U.S.
FILED
SEP 25 1991
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1991

ABUNDANT LIFE CHRISTIAN CENTRE, INC.

Petitioner,

v.

WILLIAM MARKHAM, as Broward County Property Appraiser,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

E. SCOTT GOLDEN
Counsel for Petitioner
644 Southeast 4th Avenue
Fort Lauderdale, Florida 33301
(305) 764-6766

and

PERRY W. HODGES, JR.
644 Southeast 4th Avenue
Fort Lauderdale, Florida 33301
(305) 764-6766

QUESTIONS PRESENTED

1. Whether a state statute that requires that an action to contest a real property ad valorem tax assessment be brought within sixty days from the date the assessment is certified for collection or be forever barred violates the real property owner's due process rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution in that both the method of giving notice and the content of the notice are inadequate to afford taxpayers an opportunity to present their objections.

2. Whether the Due Process Clause of the Fourteenth Amendment to the United States Constitution is violated by a property appraiser who, upon the request of a property owner, agrees to review for exemption a real property ad valorem tax assessment, fails to apprise the property

owner of the final date to contest the assessment, and then refuses to review the assessment for exemption after the termination of the contest period.

STATEMENT REGARDING CORPORATION

As required by Rule 29.1 of the Rules of the Supreme Court, Abundant Life Christian Centre, Inc. states that it has neither parent nor subsidiary corporations.

STATEMENT UNDER RULE 29.4(c)

Because the constitutionality of Fla. Stat. Ann. sec. 194.171(2), Fla. Stat. Ann. sec. 194.171(6), and Fla. Stat. Ann. sec. 193.122(2) are all drawn into question, and because neither the State nor an agency, officer, or an employee of the State is a party, 28 U.S.C. sec. 2403(b) may be applicable.

TABLE OF CONTENTS

	Page
Questions Presented	i
Statement Regarding Corporation	iii
Statement Under Rule 29.4(c)	iii
Table of Contents	iv
Table of Authorities	vi
Opinions Below	1
Jurisdictional Statement	3
Constitutional Provisions and Statutes Involved	4
Statement of the Case	5
Raising the Federal Question	10
Argument for Allowance of the Writ	12
Conclusion	33
APPENDIX	
Amended Complaint	1a
Order of Broward County Circuit Court denying Motion for Summary Judgment	18a
Response to Petition for Writ of Prohibition Directed to the Circuit Court for the 17th Judicial Circuit (without Appendix)	20a

Opinion of Florida Fourth District Court of Appeal 50a

Order of Florida Fourth District Court of Appeal denying Motion for Rehearing and Motion for Certification 61a

Order of Broward County Circuit Court granting Motion for Summary Judgment 63a

Order of Supreme Court of Florida granting Abundant life Christian Centre, Inc.'s Motion to File a Brief as Real Party in Interest . 65a

Opinion of Supreme Court of Florida denying review 66a

Fla. Const. art. VII, sec. 3(a) . . 68a

Fla. Stat. sec. 193.122(2) 68a

Fla. Stat. sec. 193.122(3) 69a

Fla. Stat. sec. 194.171(2) 70a

Fla. Stat. sec. 194.171(6) 71a

Fla. Stat. sec. 196.192(1) 71a

Fla. Stat. sec. 197.322(1) 72a

Fla. Stat. sec. 197.322(3) 72a

TABLE OF AUTHORITIES

Cases Cited:

Armstrong v. Armstrong, 130 F.R.D. 449 (D.Colo. 1990) 18

Burris v. Sewer Improvement District No. 147, 743 F.Supp. 655 (E.D.Ark. 1990) 19,20

Emley v. Indiana Department of State Revenue, 536 N.E.2d (Ind.App. 1 Dist. 1989) 19,20,21

Markham v. Moriarty, 575 So.2d 1307 (Fla.App. 4th DCA 1991) 2

Markham v. Neptune Hollywood Beach Club, 527 So.2d 814 (Fla. 1988) . 13,14

Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 98 S.Ct. 1554 (1978) 22

Mennonite Board of Missions v. Adams, 462 U.S. 791, 103 S.Ct. 2706 (1983) 15,17

Mullane v. Central Hanover Bank and Trust Company, 339 U.S. 306, 70 S.Ct. 652 (1950) 14,15,16,17 19,20,23,26

North Laramie Land Co. v. Hoffman, 268 U.S. 276, 45 S.Ct. 491 (1925) 17,18,20

Ortiz v. Regan, 749 F.Supp. 1254 (S.D.N.Y. 1990) 22

Ross v. Martin, 800 F.2d 808 (8th Cir. 1986) 18,20

Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 108 S.Ct. 1340 (1988) 14,16,17 18,30

Federal Statutes Cited:

28 U.S.C. Sec. 1257(a) 4

United States Constitution Cited:

Fourteenth Amendment 3,4,16

State Statutes Cited:

Fla. Stat. sec. 193.122(2) (1989). 4,7,27

Fla. Stat. sec. 193.122(3) (1989). 3,4,14

Fla. Stat. sec. 194.171(2) (1989). 3,4,14

Fla. Stat. sec. 194.171(6) (1989). 3,4,12 13,14

Fla. Stat. sec. 196.192(1) (1989). 5

Fla. Stat. sec. 197.322(1) (1989). 5,25

Fla. Stat. sec. 197.322(3) (1989). 5,26,27

OPINIONS BELOW

Abundant Life Christian Centre, Inc. ("Abundant Life") filed an action against the Broward County Property Appraiser ("Property Appraiser") with regard to ad valorem real property taxation on real property owned by Abundant Life in Broward County, Florida. The action proceeded under an Amended Complaint. (App. 1a-17a)

The Property Appraiser sought summary judgment, which was denied by the Broward County Circuit Court under an Order Denying Motion for Summary Judgment. (App. 18a-19a) Thereafter, the Property Appraiser sought a Writ of Prohibition.

The Florida Fourth District Court of Appeal reversed the Broward County Circuit Court under an opinion that consists of a Writ of Prohibition directed to the Circuit Court Judge and mandating the

entry of summary judgment on behalf of the Property Appraiser and against Abundant Life. The opinion appears in the Appendix at pages 50a-60a and has been published as Markham v. Moriarty, 575 So.2d 1307 (Fla.App. 4th DCA 1991). The opinion is based upon the position that the courts are divested of jurisdiction under a Florida Statute limiting the period in which to contest an ad valorem real property tax assessment to the sixty days after the certification by the Property Appraiser of the tax rolls.

Consequent upon the Writ of Prohibition, the Broward County Circuit Court entered an Order Granting Motion for Summary Judgment. (App. 63a-64a) Although the Supreme Court of Florida permitted Abundant Life to appeal as the real party in interest, App. 65a, it declined to

accept jurisdiction under Abundant Life's Petition for Review. (App. 66a-67a)

JURISDICTIONAL STATEMENT

Abundant Life prays that a Writ of Certiorari be issued to review the judgment of the Supreme Court of Florida entered in the above-captioned case on June 28, 1991, denying review of a Writ of Prohibition entered by the Florida Fourth District Court of Appeal holding that Florida Statutes secs. 194.171(2) and 194.171(6) are not unconstitutional as a violation of Abundant Life's due process rights under the Fourteenth Amendment of the United States Constitution. This Petition is being docketed in this Court within ninety days from the date that the Supreme Court of Florida declined to accept jurisdiction on Abundant Life's

Petition for Review. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Sec. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment XIV to the Constitution of the United States provides in pertinent part:

> . . . no State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fla. Const. art. VII, sec. 3(a). See Appendix for text.

Fla. Stat. sec. 193.122(2). See Appendix for text.

Fla. Stat. sec. 193.122(3). See Appendix for text.

Fla. Stat. sec. 194.171(2). See

Appendix for text.

Fla. Stat. sec. 194.171(6). See Appendix for text.

Fla. Stat. sec. 196.192(1). See Appendix for text.

Fla. Stat. sec. 197.322(1). See Appendix for text.

Fla. Stat. sec. 197.322(3). See Appendix for text.

STATEMENT OF THE CASE

A. Statement of the Facts.

In late October or early November, 1989, Abundant Life received an ad valorem real property tax bill assessing a real property parcel ("Property") utilized by Abundant Life solely for purposes exempt under Florida constitutional and statutory law from ad valorem real property taxation. Fla. Const., art. VII, sec.

3(a); Fla. Stat. sec. 196.192(1). In December, 1989, Abundant Life's attorney contacted the Broward County Property Appraiser's Office to request an informal hearing to present evidence of Abundant Life's right to an exemption for the Property. Abundant Life's attorney was referred to the Property Appraiser's attorney, who informed the Abundant Life attorney that evidence of the use of the property, which is the factual basis on which an exemption request is granted, should be compiled and submitted directly to him. All the requested information was submitted in early 1990, with the request that the information be reviewed and the exemption be granted. After repeated attempts to obtain a response from the Property Appraiser's attorney in February and March, 1990, Abundant Life filed suit

to recognize the exemption under several different theories in March, 1990, which was prior to the date of delinquency for the assessed taxes. In April, 1990, Abundant Life requested that the Property Appraiser provide the dates of certification, which by statute is available to anyone who submits a written request, Fla. Stat. sec. 193.122(2), but the Property Appraiser refused to supply the date of second certification until ordered to do so by the Circuit Court.

B. Procedural History.

Abundant Life filed a Complaint against the Broward County Property Appraiser in March, 1990. Subsequently, an Amended Complaint was substituted upon Motion granted by the Circuit Court of Broward County. In addition to several counts based solely on Florida law, the

Amended Complaint alleged (1) that the Florida Statute that required persons subject to an ad valorem property tax assessment to file an action contesting the imposition of a statutorily-prohibited tax within sixty days of certification of the tax rolls, or to be forever barred, (i) without regard to the date the notices of tax due are sent to or received by the taxpayers, (ii) without regard to the length of the period between receipt by taxpayers of a notice of tax due and the date the action is barred, (iii) without notice to taxpayers of the unusually short period of time in which to file an action to contest the assessment, and (iv) without regard to the fact that the tax is not delinquent for approximately five months, is overbroad on its face, and violates the due process rights of the

property owner, and (2) that Gaylord Wood, attorney for the Property Appraiser, agreed to review for exemption the real property ad valorem tax assessment brought to his attention by Abundant Life and then, after the termination of the claims period, refused to review the assessment for the exemption. A motion for summary judgment brought by the Property Appraiser was denied (App. 18a-19a), and the Property Appraiser sought a Writ of Prohibition from the Florida Fourth District Court of Appeal, which was granted on the basis that the limiting statute was a statute of nonclaim, not limitations, and, therefore, the Circuit Court was without jurisdiction. (App. 50a-60a) The Writ of Prohibition further required the Broward County Circuit Court to grant the Property Appraiser's Motion

for Summary Judgment. After denial of a Motion for Rehearing, Abundant Life appealed the Writ of Prohibition to the Supreme Court of Florida, which declined to accept jurisdiction under Order dated June 28, 1991. (App. 66a)

RAISING THE FEDERAL QUESTION

Two questions are at issue in this Petition. Both issues were raised in the Amended Complaint.

Count IV of the Amended Complaint is entitled "Violation of Due Process Requirement." This Count recites the factual basis for Abundant Life to contest the refusal of the Property Appraiser to review a void assessment on the basis that a state statute of nonclaim prevented jurisdiction and forever barred Abundant Life owner from contesting the Property

Appraiser's assessment after sixty days from the date of certification of the ad valorem real property tax rolls. (App. 1a-17a)

The issue of the failure of the Property Appraiser to review a tax bill after being notified of Abundant Life's objection to the assessment, after agreeing to review the assessment, failing to notify Abundant Life of the date of termination of the claims period, and then refusing to review the assessment after the termination of the claims period, is first raised in Counts VI and VII of the Amended Complaint. (App. 1a-17a)

Abundant Life again raised these issues in its response to the Property Appraiser's Motion for Writ of Prohibition. (App. 20a-49a). The Florida Fourth District Court of Appeal expressly

rejected the federal constitutional claims raised before it in Abundant Life's Response to Petition for Writ of Prohibition Directed to the Circuit Court for the 17th Judicial Circuit (App. 50a-60a) and issued the Writ of Prohibition. The Supreme Court of Florida declined to review the entry of the Writ of Prohibition. (App. 66a-67a)

ARGUMENT FOR ALLOWANCE OF THE WRIT

The question presented to the Court has never previously been addressed by the Court. The issue of the adequacy of the content of published notice, in the context of ad valorem real property taxation, affects every owner, mortgagee, and lessee of real property in the United States.

The intriguing twist to the issue under consideration is that it is not only

the notice of the ad valorem real property tax assessment, but the notice of the period to contest the imposition by the state of the tax, that is inadequate. Section 194.171(6) of the Florida Statutes, the constitutionality of which has been upheld by the Florida Supreme Court in Markham v. Neptune Hollywood Beach Club, 527 So.2d 814 (Fla. 1988), removes jurisdiction from the courts and forever bars from consideration or review any objection to the Property Appraiser's tax assessment if not filed within a sixty day period. Fla. Stat. sec. 194.171(6). It is the adequacy of notice of this sixty-day period, which changes from year to year, that is at issue.

Florida law requires that a property owner file his action in court contesting an ad valorem real property tax assess-

ment, if at all, within sixty days of the date on which the county property appraiser certifies the tax roll. ("Certificate to Roll," "Certification," or "Certificate"). Fla. Stat. sec. 194.171(2). The statute limiting the contest period to sixty days, Fla. Stat. 194.171(6), has been construed as a statute of nonclaim, rather than a statute of limitations, Neptune Beach, supra, thus rendering the courts impotent in addressing issues such as estoppel, fraud, or misrepresentation on behalf of the Property Appraiser's office, such as occurred in this case. This inability of the courts even to consider whether fundamental notions of fairness have been violated by the state requires that property owners be afforded sufficient notice to protect their interests.

This Court's recent decision in Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 108 S.Ct. 1340 (1988), building on the line of cases from Mullane v. Central Hanover Bank and Trust Company, 339 U.S. 306, 70 S.Ct. 652, (1950), through Mennonite Board of Missions v. Adams, 462 U.S. 791, 103 S.Ct. 2706 (1983), requires that the adequacy of the content of publication notice in the context of ad valorem real property taxation be resolved.

This Court stated in Mullane, supra, the basic principle of due process, as follows:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Id., 339 U.S., at 314, 70 S.Ct., at 657. In the language of Mullane, the question in this case is whether the notice scheme mandated by statute is reasonably calculated to afford interested parties an opportunity to present their objections.

In Pope, this Court reviewed the question of notice in the context of a probate nonclaim statute. This Court affirmed the principle in such cases that the level of notice required is to be determined by "balancing the 'interest of the State' and 'the individual interest sought to be protected by the Fourteenth Amendment.'" Id., quoting Mullane, supra, 339 U.S., at 314, 70 S.Ct., at 657.

The state's interest in the present case is to have certainty in the tax process in a timely fashion. However, the

state has no interest in failing to notify property owners of the date by which tax objections must be filed. The individual's interest in protecting his property rights from unwarranted taxation is significant.

In situations in which no particular potential creditor or claimant is known, this Court has long held that publication notice can be sufficient. See, e.g., Mullane, supra. Conversely, when a particular potential creditor or claimant is known, actual notice is required. See, e.g., Pope, supra, and Mennonite, supra.

The initial issue in this case is not whether actual notice is required, but the adequacy of the publication notice given. In North Laramie Land Co. v. Hoffman, 268 U.S. 276, 45 S.Ct. 491 (1925), this Court addressed the adequacy of the notice of

highway initiation proceedings to the affected community. The Court found publication notice to be adequate, but noted that the published notice "contained the information that all objections to the proposed road and all claims for damages 'must be' filed not later than June 7, 1917." Id., at 280-281, 45 S.Ct., at 493.

In Armstrong v. Armstrong, 130 F.R.D. 449 (D.Colo. 1990), a probate claims case decided after Pope, supra, the Court held that "the relevant inquiry is not whether [potential claimants] had actual knowledge that decedent's estate was open, but rather, whether [they] had actual notice of the deadline for filing claims." Id. at 453. That is exactly the concern in the present case.

In a recent case involving state income taxes, the Eighth Circuit Court of

Appeals reviewed the relevant case law and found notice of a proposed tax assessment to be sufficient when it advised recipients of the consequences of failing to protest the tax assessment. Ross v. Martin, 800 F.2d 808, 812 (8th Cir. 1986). Although it is not necessary that all the consequences of a taxpayer's inaction be relayed in the notice, it is necessary that the notice be sufficient to alert the taxpayer to substantial adverse consequences in the event of inaction. Emley v. Indiana Department of State Revenue, 536 N.E.2d (Ind.App. 1 Dist. 1989).

In a case involving the creation of a sewer improvement district, notice was found to be sufficient where it was published twice and mailed to every property owner and contained the operative statute. Burris v. Sewer Improvement Dis-

trict No. 147, 743 F.Supp. 655 (E.D.Ark. 1990). In the published notice at issue, no information is given linking the Certificate to the limitation statute or to any rights of the affected taxpayers.

This Court adopted in Mullane, supra, a test for determining whether notice is adequate:

> But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.

Id., 339 U.S., at 315, 70 S.Ct., at 657.

In the present case, the statute does not require that the published notice state the date by which objections and claims must be filed, as in North Laramie, supra, the length of the period during which to protest the tax, as in Ross, supra, that adverse consequences will

ensue in the event of inaction, as in Emley, supra, or even the operative statute, as in Burris, supra. In fact, the published notice of the Certificate does not state or suggest that any rights of the property owners are affected by the Certificate.

The only "notice" given regarding the final assessed ad valorem real property tax is the tax notice itself. Although the notices may not be sent to property owners until after the Certificate is issued, which begins the running of the sixty-day nonclaim period, the notices do not state the date when the nonclaim period begins or ends, the duration of the period, or the consequences of failing to file an objection so quickly.

Generally, affected persons are charged with knowledge of relevant

statutes. This is especially true when tax statutes are at issue, because they have universal application. See, e.g., Emley, supra. However, in the present case, knowing the statutory provisions is insufficient. Because the nonclaim period varies from year to year, depending on the date the Certificate is made, timely notice that the claims period has been triggered is critical to the taxpayer's right to file a timely objection to improper taxation.

In Ortiz v. Regan, 749 F.Supp. 1254 (S.D.N.Y. 1990), the court reviewed the constitutionality of the notice provided to a retired public employee prior to an adverse modification to her retirement benefits and concluded that it was constitutionally flawed in that it failed to inform the claimant of the opportunity

to present her objections. This decision was based on Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 98 S.Ct. 1554 (1978), in which this Court found that a notice was fatally flawed that failed to apprise utility customers of the objection process prior to termination of their utilities.

In the case at issue, the lack of any information in the published notice to trigger a response by reasonably affected individuals is further exacerbated by three factors. First, on no other notice is the property owner given actual notice of either the termination of the claims period or the fact that he has sixty days from the certification date to contest the assessment or be forever barred. Such information could be supplied at no cost and no effort by the property appraiser on

the tax notice. Under the balancing test enunciated in Mullane, supra, the state has no adverse interest or cost in providing the notice on the tax bills, while the benefit to the individual's property interest is significant.

The second factor is that the date of publication of the notice of the Certification generally occurs prior to the date a property owner receives his tax notice. Therefore, even if the property owner is aware that the Certificate somehow has an effect on his objection period, he may not even know whether he has an objection until after the sole publication. Even a diligent taxpayer who is aware that there is only one publication of the notice that begins his nonclaim period and who, therefore, reads every newspaper of general circulation in the entire county every day

from the date he receives his tax notice, would be too late to see the published notice and would never receive notice, which could have been printed on his tax notice without cost or effort. This is certainly not "notice reasonably calculated, under all the circumstances, to . . . afford [interested parties] an opportunity to present their objections." Id., 339 U.S., at 314, 70 S.Ct., at 657.

The third factor is that no requirement exists that the property owner receive his tax bill prior to the termination of the claims period. The Property Appraiser does not have a limited number of days to send the certified tax roll to the tax collector after publication of the Certification, Fla. Stat. sec. 197.322(1), and the tax collector is not required to send the tax notices within the sixty days

after the Certificate is issued. Therefore, if the Property Appraiser were to experience any delay in delivering the certified tax roll to the tax collector after the publication, or the tax collector experienced any delay for any reason in sending the tax notices, which he has twenty working days to send pursuant to section 197.322(3) of the Florida Statutes, the taxpayer may not receive his tax bill until after the claims period is over, thereby forever barring the taxpayer from contesting a tax bill that he never received in sufficient time to bring an action.

There are numerous reasons that the tax collector may not send the tax notices immediately. Whether due to a significant event, such as a court order due to a suit protesting the appraisal or collection

process, or due to a seemingly innocuous occurrence, such as an inadvertent bureaucratic or computer error in preparing or sending the bills, the fact remains that the taxpayer's time during which to respond would become impossibly short, if it has not expired altogether.

This third factor has rather far-reaching implications. Under the Florida Statutes, taxpayers are granted the right to request from the Property Appraiser a copy of the Certification. Fla. Stat. sec. 193.122(2). However, even if the taxpayer is aware of this right, it is unlikely that he would receive notice in time to protect his rights. Section 197.322(3) of the Florida Statutes requires the tax collector to mail a tax notice to the taxpayer within twenty working days after receipt of the

certified roll. However, because the Florida Statutes do not state any period of time by which the Property Appraiser must transmit the certified roll to the tax collector, even assuming that the roll is transmitted to the tax collector the very day of certification, once weekends, holidays, and the mails are taken into account, if the taxpayer receives his tax notice and diligently writes for a copy of the certification notice, the property appraiser would have the taxpayer's request for a copy of the certification as early as approximately thirty-five days after certification. There is no stated period within which the Property Appraiser must respond and, of course, this is the period during which the Property Appraiser's office is busy holding administrative tax hearings before the Property Appraisal

Adjustment Board. Given the necessary time for mailing, as well as weekends and holidays during November and December, if the Property Appraiser fails to respond within eight to ten days, the taxpayer would not even receive the notice of the date of Certification until after the date to contest the tax notice has elapsed. Such notice, even if received a few days prior to the termination of the objection period, does not cite the statute that discloses the sixty-day limitation, does not state the termination of the filing period, and does not state that actions not timely filed are forever barred. Therefore, even if through a fortuitous set of events the notice were received by the diligent taxpayer while a few days remained to file his action, the content of the notice would remain defective.

The foregoing reasons are more than sufficient under the relevant case law to find that due process requirements are not met in Florida's statutory scheme for protesting ad valorem real property tax assessments. However, in addition to the facial improprieties, Abundant Life's due process rights were further eroded by the actions of the Property Appraiser's attorney. His offer to Abundant Life's representative to review the tax assessment, which offer was not repudiated until after the termination of the claims period, coupled with his failure to apprise Abundant Life of the termination date of the claims period, violated Abundant Life's due process rights. As in Pope, supra, once an actual claimant or adverse party is known, due process requires that such party be advised of the

time within which to respond. In the present case, not only did the state, acting through the office of the Property Appraiser, not inform Abundant Life of the termination of the nonclaim period, beyond which Abundant Life would forever be barred from making any protest of its tax bill, the state gave Abundant Life information calculated to create the misimpression that the erroneous tax bill could be corrected.

The determination of whether notice is sufficient to inform a person of the potential deprivation of his property rights depends on whether the particular notice is reasonably calculated to inform those potentially injured by lack of notice, the interest of the state in not incurring additional cost for minimal benefit, and the importance of the right

to be protected. Notice that does not actually inform the property owner of the potential deprivation or the date by which he may be barred from contesting the deprivation, especially when coupled with the fact that it is not required for him to have yet been informed of the potential deprivation when the notice is given, is not reasonable notice and fails to afford the property owner due process as required under the Constitution.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should grant this Petition.

Respectfully submitted,

By E. Scott Golden

E. Scott Golden
Counsel for Petitioner
644 Southeast 4 Avenue
Fort Lauderdale, Florida 33301
(305) 764-6766

and

Perry W. Hodges, Jr.
644 Southeast 4th Avenue
Fort Lauderdale, FL 33301
(305) 764-6766

September 25, 1991

No. 91-

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1991

ABUNDANT LIFE CHRISTIAN CENTRE, INC.

Petitioner,

v.

WILLIAM MARKHAM, as Broward County Property Appraiser,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI - APPENDIX

E. SCOTT GOLDEN
Counsel for Petitioner
644 Southeast 4th Avenue
Fort Lauderdale, Florida 33301
(305) 764-6766

and

PERRY W. HODGES, JR.
644 Southeast 4th Avenue
Fort Lauderdale, Florida 33301
(305) 764-6766

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO: 90-09869 18

ABUNDANT LIFE CHRISTIAN CENTRE, INC.,

Plaintiff,

vs.

WILLIAM MARKHAM, Property Appraiser For Broward County, Florida,

Defendant
_____/

AMENDED COMPLAINT

COMES NOW the Plaintiff, by and through its undersigned attorney, and sues Defendant, William Markham, the Property Appraiser for the County of Broward, State of Florida, and says as follows:

1. Plaintiff is at all material times an incorporated Church (the "Church").

2. Defendant is at all material

times the Property Appraiser for Broward County (the "Appraiser") and is the party against whom suit is brought pursuant to Section 194.181(3) of the Florida Statutes.

3. This is an action to contest the attempted imposition by the Appraiser of ad valorem real property taxes on property owned by the Church, the sole function of which is its use for worship and related religious activities.

4. Plaintiff has had an established place of worship at 1500 North State Road Seven, Margate, Florida, for more than 10 years.

5. On or about August 26, 1988, the Church acquired the property referred to as Parcel B of the Plat known as the CENTRAL PARK OF COMMERCE in the City of Margate, County of Broward, (the "Property") for the purpose of complying

with the zoning requirements for the establishing of a new place of worship to accommodate the Church's congregation, ministries, and service. The Property is contiguous to other property previously purchased by the Church and exempted from ad valorem taxation and was and is to be used together with the other property for the Church's exempt purposes.

6. The contiguous property and, when acquired, the Property was used a number of times from early 1987 through 1989, and at all times such use consisted solely of Church worship and related religious activities, such as prayer meetings, special services, rallies, and special youth and children's religious activities. From the time that the Property was acquired by the Church, it was never used for any purpose not exempt under the provisions of Chapter 196 of the Florida

Statues.

7. This action was brought within sixty days of the certification of the tax rolls by the Property Appraiser. All conditions precedent to the institution of this action have been fulfilled.

8. The Appraiser has made or caused to be made an assessment on the Property of ad valorem taxes for the tax year 1989 at the full commercial value and without the exemption to which the Church is entitled. A copy of the Appraiser's written Notice of Assessment is attached hereto and marked Exhibit A and shows a gross tax due of $63,527.37.

COUNT I

VOID ASSESSMENT

9. Plaintiff realleges and incorporates the statements of Paragraphs 1 through 8 as fully as if set forth herein.

10. Pursuant to Article VII, Section

3(a), of the Florida Constitution, property used for certain purposes may be exempted by general law from taxation. Section 196.192(1) of the Florida Statutes provides such an exemption pursuant to which the Property is not subject to ad valorem taxes. The assessment by the Appraiser is not authorized by law.

11. Because the property is owned by the Church and is used solely for exempt purposes, the Property is not subject to tax and the assessment against the Property is void.

WHEREFORE, Plaintiff prays for judgment against the Defendant and entry of an order declaring the assessment against the Plaintiff due to the Property to be void and extinguishing all liability of the Plaintiff thereunder; costs of this action; and such further and other relief as the Court may deem just.

COUNT II

BREACH OF STATUTORY REQUIREMENTS

12. Plaintiff realleges and incorporates the statements of Paragraphs 1 through 8 as if fully set out herein.

13. Criteria for determining whether any property is used for exempt purposes is set out in Section 196.196 of the Florida Statutes.

14. The Appraiser has failed to apply the statutory criteria to the Church and Property; therefore, the assessment is arbitrary and capricious. Furthermore, the amount of the assessment is wrong.

WHEREFORE, Plaintiff prays for judgment against the Defendant and entry of an order requiring that the statutory criteria be applied to the Church and Property on a non-arbitrary and non-capricious basis; declaring the assessment against the Property to be void and

extinguishing all liability of the Plaintiff thereunder; costs of this action; and such further and other relief as the Court may deem just.

COUNT III

BREACH OF PUBLIC POLICY

15. Plaintiff realleges and incorporates the statements of paragraphs 1 through 8 as if fully set out herein.

16. It has long been the public policy of Florida that real property owned by a tax-exempt organization and designated and used for charitable, religious, scientific, educational, or literary purposes is never subject to ad valorem taxes.

17. The attempt by the Appraiser to impose this assessment on the Church is a flagrant departure from this constitutionally-protected policy and from the provisions of the Florida Statutes.

18. The Church has supplied the Appraiser with adequate proof that the Property qualifies for exemption under Section 196.192(1) of the Florida Statutes.

19. Should this assessment stand and the Tax Collector be permitted to collect taxes based on said assessment, public policy would be breached and an unfortunate precedent with far-reaching harmful ramifications would be set.

WHEREFORE, Plaintiff prays for judgment against the Defendant and entry of an order requiring that the statutory criteria be applied to the Church and Property; declaring the assessment against the Plaintiff due to the Property to be void and extinguishing all liability of the Plaintiff thereunder; costs of this action; and such further and other relief as the Court may deem just.

COUNT IV

VIOLATION OF DUE PROCESS REQUIREMENTS

20. Plaintiff realleges and incorporates the statements of Paragraphs 1 through 19 as if fully set out herein.

21. Plaintiff received its notice of ad valorem assessment on the Property ("Notice") in November, 1989, showing taxes due in March, 1990, with a discount for early payment.

22. The Notice did not inform the Plaintiff that a void tax notice had to be assessed within sixty (60) days of certification of the tax rolls, pursuant to Section 194.171(2) of the Florida Statutes.

23. The Plaintiff was not notified that it was required to bring an action contesting the imposition of statutorily-prohibited taxes within sixty days of certification of the tax rolls or

be forever barred.

24. It is unreasonable to believe that the taxpayer would know, or have reason to believe, that the period for contesting the imposition of statutorily-prohibited taxes would end months prior to the final date the tax was due.

25. A statute requiring taxpayers to file an action contesting the imposition of a statutorily-prohibited tax within sixty days of certification of the tax rolls, or be forever barred, (i) without regard to the date the notices of tax due are received by the taxpayers, (ii) without regard to the length of the period between receipt of notice of tax due by the taxpayers and the date the action is barred, (iii) without notice to taxpayers of the unusually short period of time in which to file an action, and (iv) without regard to the fact that the tax is not

delinquent for approximately seven months, is overbroad on its face and is arbitrary and capricious in its effect.

WHEREFORE, Plaintiff prays that the Court find application of Section 194.171(2) of the Florida Statutes unconstitutional as applied to the Plaintiff, permitting Plaintiff to continue its action to contest the imposition of a void tax, and such further and other relief as the Court may deem just.

COUNT V

WRIT OF MANDAMUS

26. Plaintiff realleges and incorporates the statements of Paragraphs 1 through 25 as if fully set out herein.

27. This is a petition for a writ of mandamus.

28. Under Rule 12D-12.042 of the Florida Administrative Code, a duty of the Property Appraiser is to correct errors

made by themselves or their deputies in the correction of the tax roll. The corrections are to be made immediately upon discovery.

29. Errors of property appraisers may be corrected at any time.

30. Correction of errors is a ministerial responsibility of the Property Appraiser.

31. Plaintiff has a right to have Defendant Property Appraiser perform this duty in that, on or before December 29, 1989, Plaintiff requested that the Property Appraiser take notice that the Property was improperly classified as taxable property, when it was non-taxable property.

32. Property Appraiser, through his deputies and authorized representatives, refused to correct the classification of the Property.

33. Plaintiff has no other adequate

remedy to compel the Property Appraiser to perform his duty in the Property, in that the Property Appraiser has contested Plaintiff's action opposing the imposition of tax on the Property.

WHEREFORE, Plaintiff prays that this Court grant an order directing the Property Appraiser to show cause why the writ should not be granted and, after a hearing on this matter, to issue a peremptory writ ordering the Property Appraiser to correct the error in the classification of the Property and void the assessment on the property.

COUNT VI

BREACH OF CONTRACT

34. Plaintiff realleges and incorporates the statements of Paragraphs 1 through 19 as if fully set out herein.

35. On or about December 29, 1990, Gaylord Wood, attorney for Property

Appraiser, agreed on behalf of the Property Appraiser, with Plaintiff's authorized representative, to consider the merits of Plaintiff's claim that the Property was classified improperly.

36. At Mr. Wood's request, Plaintiff obtained a list of the uses of the Property and forwarded the list to Mr. Wood. When Mr. Wood did not respond, another copy of the list was forwarded one month later. Mr. Wood still failed to respond.

37. The Property Appraiser has breached his oral agreement with Plaintiff in that he has failed to consider the merits of Plaintiff's claim that the property was classified improperly.

38. Plaintiff has no adequate remedy in law.

WHEREFORE, Plaintiff prays that the Court order specific performance by the Property Appraiser of his agreement with

Plaintiff and such other and further relief as the Court deems proper.

COUNT VII

ESTOPPEL

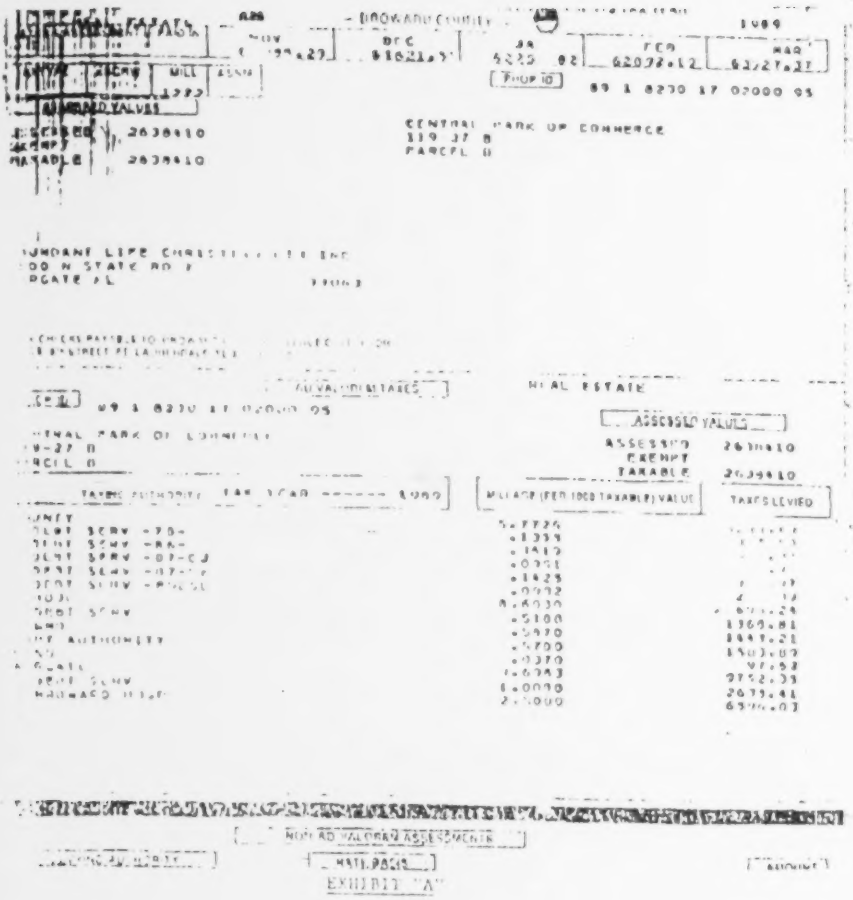
39. Plaintiff realleges and incorporates the statements of Paragraphs 1 through 38 as if fully set out herein.

40. Plaintiff relied on Defendant's agreement to consider the merits of Plaintiff's claim that the Property was classified improperly.

WHEREFORE, Plaintiff prays that the Court order Defendant to consider the merits of Plaintiff's claim that the Property was classified improperly, and such further and other relief as the Court may deem just and proper.

E. SCOTT GOLDEN, ESQUIRE
Florida Bar No. 330442
Attorney for Plaintiff
644 S.E. 4th Avenue
Fort Lauderdale, Florida 33301
(305) 764-6766

cpt2125a.doc



17a

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO: 90-09869 (18)
JUDGE: W. HERBERT MORIARTY

ABUNDANT LIFE CHRISTIAN CENTRE

Plaintiff,

vs.

WILLIAM MARKHAM, et al.

Defendants.
_____/

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

THIS CAUSE having come on to be heard on the Motion for Summary Judgment filed by the Defendant, WILLIAM MARKHAM, as Broward County Property Appraiser, and the Court having reviewed said Motion, and having heard the argument of counsel, and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Motion for Summary Judgment filed by the

Defendant, WILLIAM MARKHAM, as Broward County Property Appraiser, is denied.

DONE AND ORDERED in Chambers in Fort Lauderdale, Broward County, Florida, this 4th day of September, 1990.

/s/W. Herbert Moriarty
W. HERBERT MORIARTY
CIRCUIT JUDGE

Copies furnished to:
E. Scott Golden, Esq.
Gaylord Wood, Jr., Esq.

IN THE DISTRICT COURT OF APPEAL IN THE STATE OF FLORIDA FOURTH DISTRICT, P.O. BOX A, WEST PALM BEACH, FL 33402

WILLIAM MARKHAM,
as Broward County
Property Appraiser,

Petitioner (s),

CASE NO. 90-2582

v.

ABUNDANT LIFE
CHRISTIAN CENTRE,
INC., et al,.

Respondent (s).
_____/

RESPONSE TO PETITION FOR WRIT OF PROHIBITION DIRECTED TO THE CIRCUIT COURT FOR THE 17TH JUDICIAL CIRCUIT

LAW OFFICES OF
PERRY W. HODGES,JR.
644 Southeast 4th Avenue
Fort Lauderdale, Florida 33301
Telephone No. (305)764-6766

TABLE OF CITATIONS
CASES

GULFSIDE INTERVAL VACATIONS, INC. V. SCHULTZ, 479 So.2d 776 (Fla. 2d DCA 1985) 6,7,8

MARKHAM V. NEPTUNE HOLLYWOOD BEACH CLUB, 527 So.2d 814 (Fla. 1988) 8

MILLER V. NOLTE, 453 So.2d. 397 (Fla. 1984) 6

MULLANE V. CENTRAL HANOVER BANK & TRUST COMPANY, 339 U.S. 306, 70 S.Ct. 652d, 94 L.Ed. 180 (1983) 11

PUBLIC HEALTH TRUST V. ESTATE OF JARA, 526 So.2d 745 (Fla. 3d DCA 1988) 12

TULSA PROFESSIONAL COLLECTION SERVICES, INC. V. POPE, 108 S.Ct. 1340, 485 U.S. 478, 99 L.Ed.2d 565 (1988) 9,10,11

STATUTES

SECTION 193.122(2), Florida Statutes 4,5,10,12,13

SECTION 193.122(3),

Florida Statutes 4,5

SECTION 194.121,
Florida Statutes 13

SECTION 194.171(2),
Florida Statutes 1,3,5,6,7,8,9,10,11,12

SECTION 194.171(6),
Florida Statutes 5,6,7,8,9

SECTION 197.323(1),
Florida Statutes 4

SECTION 733.212,
Florida Statutes 12

SECTION 733.212(1)(a),
Florida Statutes 12

SECTION 733.702,
Florida Statutes 12

FACTS

On March 30, 1990, Respondent, ABUNDANT LIFE CHRISTIAN CENTRE, INC.,(Abundant Life) filed an action in the Circuit Court of the 17th Judicial Circuit in and for Broward County, Florida, in which Respondent contested the imposition of ad valorem real estate tax on certain real property owned by Abundant Life. Thereafter, Abundant Life filed a Seven Count Amended Complaint, which said Amended Complaint is now being challenged by Petitioner, William Markham (A-1-9).

On July 23, 1990, William Markham filed its Motion for Summary Judgment (A-10-14), alleging as the sole basis for the entry of a Summary Judgment, that Abundant Life's complaint was filed beyond the sixty days allowed for timely filing pursuant to sec. 194.171(2), Florida

Statutes (1989). In response to William Markham's motion, Abundant Life timely filed an affidavit of E. Scott Golden, Esq., the former counsel for Abundant Life (A-15-17). The allegations contained in Abundant Life's affidavit were unrebutted by William Markham at the hearing for Summary Judgment. The pertinent portions of the affidavit alleged that the attorney for Abundant Life spoke with Gaylord Wood, attorney for Petitioner William Markham, by telephone in December 1989. Mr. Wood requested that Abundant Life submit a list of the uses of the subject property since the date the property was purchased by Abundant Life for the church, and indicated that he would consider the merits of Abundant Life's assertions that the property was used for an exempt purpose (A-15-16, paragraphs 3 and 4).

Abundant Life then furnished a list of the exempt uses of the property, pursuant to attorney Gaylord Wood's request, and forwarded the list to Mr. Wood (A-16, paragraph 5). Attorney Gaylord Wood failed to further respond in any manner prior to Abundant Life's filing the original complaint in this cause on March 30, 1990 (A-16, paragraphs 5&7). Counsel for Abundant Life understood his December 1989 telephone conversation with Mr. Gaylord Wood to be an agreement that Mr. Wood would review the uses of the property on behalf of William Markham and that Abundant Life would not be prejudiced while Mr. Wood completed his review (A-16, paragraph 8). Furthermore, at no time did Mr. Wood or any member of William Markham's staff inform counsel for Abundant Life that the time to file a law

suit to contest the imposition of the ad valorem tax would, in their opinion, expire within sixty days of the first certification of the tax rolls of October 17, 1989. (A-17-18, paragraph 9).

In summary, the unrebutted facts before the trial court at the Summary Judgment hearing as presented by Abundant Life in the above-referenced affidavit as well as in its amended complaint, were that: (1) William Markham had specific knowledge that Abundant Life contested the imposition of the ad valorem tax on its real property; (2) That this knowledge by William Markham existed in December of 1989; (3) William Markham, despite this knowledge, never informed Abundant Life that it believed the sixty-day limitation period began to run on October 17, 1989, and that Abundant Life should therefore

file a law suit to contest the imposition of the ad valorem tax in order to protect its interests, and; (4) Not only did William Markham fail to inform Abundant Life of the sixty-day time period imposed by Section 194.171(2), Florida Statutes (1989), but it also undertook a course of conduct which led Abundant Life to believe that its claim was under review and that Abundant Life would not be prejudiced during the review period.

ARGUMENT OF LAW

I. ABUNDANT LIFE'S MARCH 30, 1989 ORIGINAL COMPLAINT WAS TIMELY FILED PURSUANT TO SECTION 194.171(2) FLORIDA STATUTES (1989), AS THE ENTIRE TAX ROLL WAS CERTIFIED FOR COLLECTION ON JANUARY 31, 1990.

It is undisputed that the tax roll was first certified by William Markham, by the property appraiser, on October 17,

1989. However, it was also admitted by counsel for William Markham at the subject hearing on William Markham's motion for Summary Judgment, that the entire tax roll was recertified for collection by the property appraiser on January 31, 1990. The original complaint herein was filed on March 30, 1989. Abundant Life's assertion, both in its amended complaint and at the Summary Judgment hearing, is that the second certification of the entire tax roll of January 31, 1990, is the correct date which began the running of the sixty-day filing period pursuant to Section 194.171(2), Florida Statutes (1989).

Section 194.171(2) Florida Statutes (1989) provides, in part, that "(2) No action shall be brought to contest a tax assessment after 60 days from the date the

assessment being contested is certified for collection under s. 193.122(2)....".

Section 193.122(2), Florida Statutes (1989), which section is referred to in the above-quoted statute, provides, in part:

> (2) After the first certification of the tax rolls by the property appraisal adjustment board, the property appraiser shall make all required extensions on the rolls to show the tax attributable to all taxable property. Upon completion of these extensions, and upon satisfying himself that all property is properly taxed, the property appraiser shall certify the tax rolls and shall within 1 week thereafter publish notice of the date and fact of extension and certification...(emphasis supplied).

It is clear that the property appraiser, under section 193.122(2), is required to certify the tax rolls as to all property. This first certification was performed by William Markham on

October 17, 1989. However, Florida Statutes also provide for the tax rolls being extended by the tax collector and certified prior to completion of the property appraisal adjustment board hearings (See section 197.323(1) Florida Statutes (1989)). In the case sub judice, the tax rolls were, in fact, extended, as the second certification of the tax rolls occurred on January 31, 1990.

Section 193.122(3), Florida Statutes (1989), provides the procedure to be utilized when the tax rolls have been extended. That section provides:

> (3) When the tax rolls have been extended pursuant to s. 197.323, the second certification of the property appraisal adjustment board shall reflect all changes made by the board together with any adjustments or changes made by the property appraiser. Upon such certification, the property appraiser shall recertify the tax rolls with all changes to

> the collector and shall provide public notice of the date and fact of recertification pursuant to subsection (2).

It is clear by the reading of the above quoted subsection, that the second certification of the tax rolls is only to reflect the changes made by the board, together with any adjustments or changes made by the property appraiser. It is not to recertify all property, but is only to recertify the property to which changes and adjustments were made subsequent to the first certification of the tax rolls. In the case sub judice, the property appraiser did not simply recertify only the property to which changes and adjustments were made pursuant to section 193.122(3). Instead, the property appraiser recertified the entire tax roll. In so doing, the property appraiser once again certified Abundant Life's tax

assessment for collection "under section 193.122(2)", thereby making the recertification date of January 31, 1990 the proper date from which the sixty-day period under section 194.171(2) began to run.

II. ENTRY OF SUMMARY JUDGMENT BY THE TRIAL COURT WOULD BE IMPROPER AT THIS POINT, AS ABUNDANT LIFE HAS TIMELY CHALLENGED THE CONSTITUTIONALITY OF SECTIONS 194.171(2) AND (6) FLORIDA STATUTES, 1989.

Alternatively, even if it is held that the October 17, 1989 date is the act which began the sixty-day period to run, Abundant Life has timely challenged the constitutionality of sections 194.171(2) and (6) in its amended complaint. William Markham's motion for Summary Judgment (A-10-14) did not address this issue, therefore it was not before the trial court at the hearing on the motion for Summary Judgment. That fact, in and of

itself, precludes William Markham's entitlement to the entry of Summary Judgment.

In Miller v Nolte, 453 So.2d 397 (Fla 1984), the Florida Supreme Court was faced with the identical issue of whether a taxpayer is foreclosed from contesting a tax assessment because of his failure to file an action within sixty days from the date the assessment was certified for collection. The Court, in a well reasoned opinion, stated:

> Persons have a right to due process when the protection and enforcement of their private rights are at issue. See Fuentes v Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L. Ed.2d 556 (1971); Goldberg v Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). Due process requires that section 194.171(2) be considered a statute of limitations. (emphasis added)

Id. at 401

The Court in Miller further expressed its concern that should section 194.171(2)

be construed to be non-claim statute, the taxpayer would be unable to raise any valid estoppel arguments as to why the taxpayer failed to file an action within sixty days of certification. Id at 401.

However, the court in Miller was addressing a pre-1983 tax assessment, and therefore did not address the subsequent enactment by the Florida legislature of subsection 194.171(6). Effective July 1, 1983, subsection (6) was added to section 194.171, making compliance with subsection (2) "jurisdictional".

The due process concerns, as expressed by the court in Miller, however, remain. The Florida legislature's addition of subsection (6) making the requirements of subsection (2) jurisdictional serves only to underscore the due process concerns of the Florida

Supreme Court in Miller.

The Second District Court of Appeal in Gulfside Interval Vacations, Inc. v Schultz, 479 So.2d 776 (Fla 2d DCA 1985), as cited by William Markham in its Petition for Writ of Prohibition, dealt specifically with both sections 194.171(2) and 194.171(6), Florida Statutes. There, the taxpayer had filed a law suit contesting a tax assessment after the sixty-day period from the date the assessment being contested was certified for collection. The Gulfside court, in adopting the plain meaning of subsection (6), held that the sixty-day requirement of subsection (2) was to be construed as a jurisdictional statute of non-claim rather than a statute of limitations. Therefore, the appellate court held that the trial court lacked jurisdiction to consider the

taxpayer's law suit. However, the Gulfside court didn't just stop there. The court went on to further state that:

> Were we free to do so, we would address the constitutionality of this result. It seems to us that barring a suit such as this at the expiration of sixty days following certification of the tax rolls--an event of which most taxpayers are unaware and of which taxpayers are not given specific notice--is inherently unfair and inequitable, and raises serious due process concerns. As the supreme court said in Miller v Nolte, persons have a right to due process when the protection and enforcement of their private rights are at issue. The court expressly stated "due process requires that section 194.171(2) be considered a statute of limitations."
>
> However, the record does not reflect that the question of constitutionality of applying subsection (6) in this case was raised in the trial court, and it has not been raised on this appeal. Therefore, we are foreclosed from considering that issue. We have no alternative but to affirm the action of the

> trial judge in dismissing this suit with prejudice. (emphasis supplied)

Id. at 778.

In the case sub judice, unlike the case before the court in Gulfside, the taxpayer, Abundant Life, has timely asserted and addressed the constitutionality of section 194.171(See A-5-6, Count IV)

The Florida Supreme Court dealt with the identical issue in Markham v Neptune Hollywood Beach Club, 527 So.2d 814 (Fla. 1988). There, the court expressly approved of the decision of the Second District Court of Appeal in Gulfside, supra. The Markham Court held that the taxpayer's law suit was properly dismissed by the trial court in light of the clear expression of the legislative intent contained in subsection (6) that

subsection (2) be considered a jurisdictional statute of non-claim. However, the Florida Supreme Court in Markham, as did the Second District Court of Appeal in Gulfside, went out of its way to point out in footnote 5 of the opinion, that the constitutionality of section 194.171(6) was not raised by the taxpayer. Id. at 816. In fact, the Markham Court further went out of its way to quote a portion of its previous opinion in Miller, supra, in which the court held that "due process requires that section 194.171(2) be considered a statute of limitations." Id. 816.

It is quite evident from the opinions in Gulfside and Markham, that the courts were precluded from addressing the due process and constitutionality concerns raised by the Florida supreme court in

Miller, supra. These concerns however, have been raised by Abundant Life in the case sub judice. Abundant Life, both in its amended complaint (A-5-6), and in its affidavit (A-15-17) raises several due process concerns relative to the application of subsections 194.171(2), and (6), Florida Statutes (1989) to the facts of this case. The property appraiser, William Markham, was aware not only of the existence of Abundant Life, but also that Abundant Life challenged the ad valorem tax assessment. Furthermore, the property appraiser was aware of these matters in December of 1989. In fact, William Markham requested that Abundant Life furnish information to it regarding Abundant Life's use of the property for tax exempt purposes, thereby delaying any attempt by Abundant Life to seek legal

action.(A-15-17, paragraphs 4 through 9; A-5-6, Count IV)

The due process issue vis-a-vis statutes of non-claim was addressed by the United States Supreme Court in Tulsa Professional Collection Services, Inc. v Pope, 108 S.Ct. 1340, 485 U.S. 478, 99 L.Ed.2d 565 (1988). There, the United States Supreme Court dealt with Oklahoma's Probate Code which required creditors to file claims against an estate within two months of the date of first publication. The method of notice to the creditors under Oklahoma's probate code was by publication. The Appellant, an assignee of a hospital's claim for expenses connected with the decedent's final illness, failed to timely file a claim in the probate estate. Therefore, the probate court denied the claim as being

untimely. The United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment required the Appellant be given notice by mail or such other means as is certain to ensure actual notice if Appellant's identity as a creditor was known or reasonably ascertainable Id. at 1346-1347. The Court stated:

> Providing actual notice to known or reasonably ascertainable creditors, however, is not inconsistent with the goals reflected in non-claim statutes. Actual notice need not be inefficient or burdensome. We have repeatedly recognized that mail service is an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice. Id. at 1347.

In the case sub judice, William Markham had specific knowledge in December of 1989, that Abundant Life contested the tax assessment. Despite this knowledge, Abundant Life was never notified that

William Markham contended or believed that the date that began the period to contest the tax was the date of first certification of the tax rolls on October 17, 1989.(A-16-17, paragraph 9).

Adding to these due process concerns, the property appraiser is not even required by Florida Statutes to advise the taxpayer of the fact that no action may be brought to contest a tax assessment after sixty days from the date the assessment is certified for collection as provided under Florida Statute 194.171(2). The only notice that is required to be given by the property appraiser is found in subsection 193.122(2), which simply requires the property appraiser "publish notice of the date and fact of extension and certification in a periodical meeting the requirements of s. 50.011 and publicly

display a notice of the date of certification in the office of the property appraiser..." Simply furnishing the date and fact of extension and certification of the tax rolls does not in any way inform the taxpayer of the effect of the certification relative to the taxpayer's ability to maintain an action to contest the tax assessment under section 194.171(2). This minimal notice requirement of section 193.122(2), Florida Statutes, (1989) does not meet the standard expressed by the Court in Pope, supra, at 1344, in which the Court quoted with approval a portion of its opinion in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, at 314, 70 S.Ct. 652, at 657, 94 L.Ed. 180 (1983) which established the fact that notification of state action which affects property must

generally be given:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

The only notification required to be given a taxpayer, as previously stated, is publication of the date and fact of certification by the property appraiser. Certainly this notice is not "reasonably calculated" to apprise the taxpayer of the sixty-day time period set forth in section 194.171(2), Florida Statutes (1989); as it does not apprise the taxpayer at all of this fact. (See Appendix A-3 of William Markham's Petition for Writ of Prohibition). Without giving notice of the certification of the tax rolls relative to the running of the sixty-day

time period of section 194.171(2), the publication of the date and fact of certification is meaningless to the average taxpayer. This is particularly true in light of the fact that ad valorem taxes are not past due until after April 1 of the following year. In fact, a discount is given to the taxpayer if payment is made prior to that time. A statutory scheme requiring an action be brought contesting a tax assessment several months prior to the date the taxpayer must pay the tax, only serves to magnify due process concerns relative to section 194.171(2), Florida Statutes (1989).

The decision by the United States Supreme Court in Pope, supra, was relied upon by the court in Public Health Trust v. Estate of Jara, 526 So.2d. 745 (Fla. 3d

D.C.A. 1988). There, the court, noting the facts before it were not distinguishable from the facts in Pope, implied by its ruling that Florida's probate nonclaim statutes, sections 733.212 and 733.702, Florida Statutes (1987), violated the notice requirements of the due process clause under the Fourteenth Amendment of the United States Constitution by not requiring notice by mail to known creditors of an estate. Id. at 745. (Effective July 5, 1989, section 733.212 was amended to require personal service by the personal representative of the notice administration upon reasonably ascertainable creditors.)

In order to satisfy the due process concerns with respect to the content of the notice required to be given by the Florida Statutes (1989), the property

appraiser should, at the very least, be required to notify the taxpayer of the sixty-day time period set forth in section 194.171(2), Florida Statutes (1989). Florida's probate nonclaim statute section 733.212(1)(a), Florida Statutes (1989) requires the personal representative to include, in its published notice of administration, the fact that all claims against the estate must be filed "within the time periods set forth in ss. 733.702 and 733.10, or be forever barred." (emphasis supplied). A similar notice requirement under section 193.122(2) Florida Statutes (1989) would certainly not impose an additional burden or expense upon the property appraiser, as it must already publish notice of the date and fact of certification under section 193.122(2) Florida Statutes (1989).

In light of Abundant Life's allegations contained in its amended complaint challenging the constitutionality of section 194.171, Florida Statutes (1989) as applied to Abundant Life under the facts of this case, the entry of Summary Judgment in favor of William Markham would be premature and improper, as this issue was not raised in William Markham's motion for Summary Judgment(A-10-14).

CONCLUSION

The trial court's order of September 4, 1990 denying William Markham's motion for Summary Judgment should not be vacated. The entire tax roll, which included Abundant Life's property, was certified for collection on January 31, 1990. Therefore, Abundant Life's original

complaint filed on March 30, 1990 was timely. Furthermore, Abundant Life has timely raised the issue in the trial court as to the constitutionality of section 194.171, Florida Statutes (1989). Therefore, this issue must still be addressed by the trial court.

Respectfully submitted,

Law Offices of
Perry W. Hodges, Jr.

BY:_____
PERRY W. HODGES, JR.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to GAYLORD A. WOOD, JR., 304 SW 12th Street, Fort Lauderdale, Florida 33315-1521, and THE HONORABLE W.

HERBERT MORIARTY, Circuit Court Judge, Broward County Courthouse, Room 801, Fort Lauderdale, Florida 33301. this ___ day of October, 1990.

LAW OFFICES OF
PERRY W. HODGES, JR.
644 Southeast 4th Avenue
Fort Lauderdale, Florida 33301
Telephone No. (305) 764-6766

_____
PERRY W. HODGES, JR.
Florida Bar No. 181190

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1991

WILLIAM MARKHAM, as
Broward County Property
Appraiser,

Petitioner,

v. CASE NO. 90-2582

W. HERBERT MORIARTY,
Circuit Court Judge

Respondent.
_____/

Opinion filed February 6, 1991

Petition for Writ of Prohibition

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

B. Jordan Stuart of Law Offices
of Gaylord A. Wood, Jr., Fort
Lauderdale, for Petitioner.

Perry W. Hodges, Jr. of Law Offices
of Perry W. Hodges, Jr., Fort
Lauderdale, for Respondent Abundant
Life Christian Centre, Inc.

PER CURIAM.

This petition for writ of prohibition contests the jurisdiction of the circuit

court over a suit challenging the Broward County Property Appraiser's 1989 assessment of certain real property. We grant the petition for writ of prohibition, quash the trial court order denying petitioner's motion for summary judgment, and remand with directions to enter summary judgment in favor of the property appraiser. We sua sponte strike Abundant Life Christian Centre, Inc. as named respondent.

On March 30, 1990, Abundant Life filed an action contesting the imposition of real estate taxes. Among the other allegations of the complaint was an allegation that the property was exempt from taxes, and an allegation that the assessment notice violated due process in that it failed to notify the taxpayer that it was required to bring an action contesting the imposition of taxes within

60 days of certification of the tax rolls. Petitioner Markham filed a motion for summary judgment based on lack of jurisdiction, claiming that the complaint was untimely because it was filed beyond the 60 days allowed for filing pursuant to section 194.171(2), Florida Statutes (1989).

The tax roll was first certified by the property appraiser on October 17, 1989. Notice of the certification was published. The tax roll was then recertified on January 31, 1990. Respondent did not file a petition with the board challenging the tax assessment.

A writ of prohibition is the appropriate procedural device to quash the improper exercise of power without jurisdiction. Such a writ may issue where a trial court exceeds its jurisdiction by failing to dismiss a cause of action con-

testing a tax assessment where the jurisdiction requirements of section 194.171 are not met. Markham v. Hinckley, 544 So.2d 1139 (Fla. 4th DCA), rev. denied, 553 So.2d 1164 (Fla. 1989); Clark v. Cook, 481 So.2d 929 (Fla. 4th DCA 1985).

Section 194.171, Florida Statutes provides in part: (emphasis added)

> (2) No action shall be brought to contest a tax assessment after 60 days from the date the assessment being contested is certified for collection under s. 193.122(2), or after 60 days from the date a decision is rendered concerning such assessment by the property appraisal adjustment board....
>
> * * * *
>
> (6) The requirements of subsections (2), (3), and (5) are jurisdictional. No court shall have jurisdiction in such cases until after the requirements of both subsections (2) and (3) have been met.

In Markham v. Neptune Hollywood Beach Club, 527 So.2d 814 (Fla. 1988), the Florida Supreme Court held that the plain meaning of subsection (6) requires that

the sixty day requirement of subsection (2) be construed as a jurisdictional statute of nonclaim rather than as a statute of limitations. The Neptune court determined that the trial court lacked jurisdiction to consider a taxpayers' suit challenging an assessment, and the constitutionality of the authorizing time share statute, where the complaint was filed more than sixty days after the tax rolls were certified. [1]

In this case, the tax rolls were extended and certified prior to completion

---

[1] The Florida Supreme Court previously had determined that the jurisdictional requirements of sec. 194.171 must be strictly enforced in Bystrom v. Diaz, 514 So.2d 1072, 1074 (Fla. 1987). See also Markham v. Hinckley, 544 So.2d 1139, 1140 (Fla. 4th DCA 1989).

of board hearings, as permitted by section 197.323(1). The property appraiser then recertified the entire tax rolls as set forth in section 193.122(3). Respondent claims that the date of the second certification of the tax roll by the property appraiser is the correct date to use as starting the running of the sixty day filing period.

Petitioner responds that the second certification of the tax roll by the property appraiser has no effect on the running of the time in which to file.

Section 193.122 provides in part as follows: (emphasis added)

> (1) The property appraisal adjustment board shall certify each assessment roll upon order of the board of county commissioners pursuant to s. 197.323, if applicable and again after all hearings required by s. 194.032 have been held....
>
> (2) After the first certification of the tax rolls by the property appraisal adjustment board, the property appraiser

shall make all required extensions on the rolls to show the tax attributable to all taxable property. Upon completion of these extensions, and upon satisfying himself that all property is properly taxed, the property appraiser shall certify the tax rolls and shall within 1 week thereafter publish notice of the date and fact of extension and certification in a periodical meeting the requirements of s. 50.011 and publicly display a notice of the date of certification in the office of the property appraiser. The property appraiser shall also supply notice of the date of the certification to any taxpayer who requests one in writing....

(3) When the tax rolls have been extended pursuant to s. 197.323, the second certification of the property appraisal adjustment board shall reflect all changes made... Upon such certification, the property shall recertify the tax rolls with all changes to the collector and shall provide public notice of the date and fact of recertification pursuant to subsection (2).

(4) An appeal of a property appraisal adjustment board decision pursuant to s. 194.036(1)(a) or (b) by the property appraiser shall be filed prior to extension of the tax roll under subsection (2) or, if the roll was extended pursuant to s. 197.323, within 30 days of recertification under subsection (3).

The language of the statute is clear. The 60 day filing period referred to in

section 194.171 is 60 days from the date of the initial certification as long as no petition challenging the assessment is pending before the Board and not 60 days from the date of a recertification. The critical date for filing an action in this instance was 60 days from October 17, 1990. Accordingly, the trial court's denial of petitioner's motion for summary judgment was a departure from the essential requirements of law.

Respondent also claims that the property appraiser was not entitled to a summary judgment because of respondent's constitutional challenge on due process grounds. Respondent contends that the notice requirements of section 193.122(2), Florida Statutes, do not comport with the standard set forth by the United States Supreme Court in Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S.

478, 108 S.Ct. 134, 99 L.Ed.2d 565 (1988). In Pope, the Court considered Oklahoma's Probate Code. The Court held that the Due Process Clause of the Fourteenth Amendment required that a creditor be given notice by mail or such other means as is certain to ensure actual notice. Respondent argues that at the very least the notice to Florida taxpayers should contain a statement similar to that found ion the Florida probate nonclaim statute (section 733.212(1)(a), Florida Statutes) which states that all claims against the estate must be filed "within the time periods set forth in ss. 733.702 and 733.10, or be forever barred."

However persons owning property within a state are charged with knowledge of relevant statutory provisions affecting the control or disposition of property. North Laramie Land Co. v. Hoffman, 268

U.S. 276, 45 S.Ct. 491, 69 L.Ed. 953 (1925). Here, the taxpayer or its representative was presumed to know the jurisdictional limitation which applies. Additionally, the principles which apply to notice in probate cases, as enunciated in Pope, are inapplicable here. in Pope, the Court distinguished nonclaim statutes with attributes of self-executing statutes of limitations from the probate nonclaim statute at issue. In the former, the self-executing feature of the statute and the state's limited involvement in the running of the time period prevent triggering protections of the Due Process Clause.

Furthermore, while the Pope court recognized that the requirement of actual notice in probate and bankruptcy proceedings, where a limited number of persons are involved, is not so burdensome

or impractical as to warrant reliance on publication notice alone, such is not the case with ad valorem tax assessments. Furthermore, section 193.122(2), Florida Statutes provides a means whereby a taxpayer can receive actual notice of the date of certification. It states that "the property appraiser shall also supply notice of the date of the certification to any taxpayer who requests one in writing. . . ."

Therefore, we grant the writ of prohibition, quash the order denying the motion for summary judgment, and remand to the trial court with directions to enter summary judgment in favor of petitioner. HERSEY, C.J., STONE AND POLEN, JJ., concur.

IN THE DISTRICT COURT OF APPEAL IN THE
STATE OF FLORIDA
FOURTH DISTRICT, P.O. BOX A
WEST PALM BEACH, FL 33402

WILLIAM MARKHAM, as
Broward County Property
Appraiser,

Petitioner(s),

v. CASE NO. 90-2582

W. HERBERT MORIARTY,
Circuit Court Judge

Respondent(s).
_____/

ALL PLEADINGS SIGNED
BY AN ATTORNEY MUST
INCLUDE THE ATTORNEY'S
FLORIDA BAR NUMBER

BY ORDER OF THE COURT:

ORDERED that Respondent, Abundant Life Christian Centre, Inc.'s Motion for rehearing is denied.

ORDERED that Respondent, Abundant Life Christian Centre, Inc.'s February 21, 1991 motion for certification is denied.

I hereby certify that the foregoing is a true copy of the original court order.

/s/Clyde L. Heath
CLYDE L. HEATH
CLERK

cc: Perry W. Hodges, Jr.
Gaylord Wood

cms

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO: 90-09869 18
JUDGE: W. HERBERT MORIARTY

ABUNDANT LIFE CHRISTIAN CENTRE

Plaintiff,

vs.

WILLIAM MARKHAM, et al.

Defendants.
_____/

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

THIS CAUSE having come before the Court upon the granting of a Writ of Prohibitition (sic), quashing the Order Denying Summary Judgment entered by this Court on September 4, 1990 in this case, the Court does hereby

ORDER AND ADJUDGE that the motion for Summary Judgment filed by the Defendant, WILLIAM MARKHAM, as Broward County Property Appraiser is hereby granted.

DONE AND ORDERED in Chambers in Fort Lauderdale, Broward County, Florida, this 4th day of March, 1991.

/s/W. Herbert Moriarty
W. HERBERT MORIARTY
CIRCUIT JUDGE

Copies furnished to:
Perry Hodges, Esq.
Gaylord Wood, Jr., Esq.

SUPREME COURT OF FLORIDA

WEDNESDAY, MAY 8, 1991

ABUNDANT LIFE CHRISTIAN CENTRE, INC.,

Petitioner,

vs. CASE NO. 77,830

WILLIAM MARKHAM, ETC.,

Respondent.

Abundant Life Christian Centre, Inc.'s Motion to File a Brief as the Real Party in Interest in these Proceedings, or, in the Alternative, to File a Brief on Behalf of W. Herbert Moriarty, Circuit Court Judge is hereby granted.

A True Copy KB

cc: Perry W. Hodges, Jr., Esquire
TEST: Gaylord A. Wood, Esquire
Hon. W. Herbert Moriarty, Circuit Court Judge

/s/ Sid J. White
Sid J. White, Clerk
Supreme Court of Florida

SUPREME COURT OF FLORIDA

FRIDAY, JUNE 28, 1991

ABUNDANT LIFE CHRISTIAN CENTRE, INC.,	*	
Petitioner,	*	
vs.	*	CASE NO. 77,830
WILLIAM MARKHAM, ETC.,	*	DISTRICT COURT OF APPEAL,
Respondent,	*	4TH DISTRICT NO. 90-2582

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

SHAW, C.J., MCDONALD, BARKETT, GRIMES and

KOGAN, JJ., concur

A True Copy KB

cc: Hon. Clyde L. Heath, Clerk
Perry W. Hodges, Jr., Esquire
TEST: Gaylord A. Wood, Esquire
Hon. W. Herbert Moriarty, Judge

Sid J. White, Clerk
Supreme Court of Florida

By: /s/ Betsy Hill
Deputy Clerk

STATE CONSTITUTIONAL PROVISIONS

Article VII, Section 3(a), of the Constitution of the State of Florida provides in pertinent part:

(a) . . . Such portions of property as are used predominately for educational, literary, scientific, religious or charitable purposes, may be exempted by general law from taxation.

STATUTORY PROVISIONS

Florida Statutes Sec. 193.122(2) provides as follows:

(2) After the first certification of the tax rolls by the property appraisal adjustment board, the property appraiser shall make all required extensions on the rolls to show the tax attributable to all taxable property. Upon completion of these extensions, and upon satisfying himself that all property is properly taxed, the property appraiser shall

certify the tax rolls and shall within 1 week thereafter publish notice of the date and fact of extension and certification in a periodical meeting the requirements of s. 50.011 and publicly display a notice of the date of certification in the office of the property appraiser. The property appraiser shall also supply notice of the date of the certification to any taxpayer who requests one in writing. These certificates and notices shall be made in the form required by the department and shall be attached to each roll as required by the department by regulation.

Florida Statutes Sec. 193.122(3) provides as follows:

(3) When the tax rolls have been extended pursuant to s. 197.323, the second certification of the property

appraisal adjustment board shall reflect all changes made by the board together with any adjustment or changes made by the property appraiser. Upon such certification, the property shall recertify the tax rolls with all changes to the collector and shall provide public notice of the date and fact of recertification pursuant to subsection (2).

Florida Statutes Sec. 194.171(2) provides as follows:

(2) No action shall be brought to contest a tax assessment after 60 days from the date the assessment being contested is certified for collection under s. 193.122(2), or after 60 days from the date a decision is rendered concerning such assessment by the property appraisal adjustment board if a petition

contesting the assessment had not received final action by the property appraisal adjustment board prior to extension of the roll under s. 197.323.

Florida Statutes Sec. 194.171(6) provides as follows:

(6) The requirements of subsections (2), (3), and (5) are jurisdictional. No court shall have jurisdiction in such cases until after the requirements of both subsections (2) and (3) have been met. A court shall lose jurisdiction of a case when the taxpayer has failed to comply with the requirements of subsection (5).

Florida Statutes Sec. 196.192(1) provides as follows:

(1) All property owned by an exempt

entity and used exclusively for exempt purposes shall be totally exempt from ad valorem taxation.

Florida Statutes Sec. 197.322(1) provides as follows:

(1) The property appraiser shall deliver to the tax collector the certified assessment roll along with his warrant and recapitulation sheet.

Florida Statutes Sec. 197.322(3) (1988) provides as follows:

(3) Within 20 days after receipt of the certified tax roll, the tax collector shall mail to each taxpayer appearing on the assessment roll, whose post-office address is known to him, a tax notice stating the amount of current taxes due

from the taxpayer and, if applicable, the fact that back taxes remain unpaid and advising the taxpayer of the discounts allowed for early payment. . . .

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

(2)

No. 91-529

Supreme Court, U.S.
FILED
OCT 24 1991
OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1991

ABUNDANT LIFE CHRISTIAN CENTRE, INC.,

Petitioner,

-vs-

WILLIAM MARKHAM, as Broward County Property Appraiser,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

GAYLORD A. WOOD, JR.
Counsel for Respondent
304 S.W. 12th. Street
Fort Lauderdale, FL 33315
(305) 463-4040

BEST AVAILABLE COPY

TABLE OF CONTENTS

Table of Authorities . . . i

Statement of the Case . . . 1

Summary of Argument 4

Statement of the Facts . . . 8

Argument, Point 1 22

Argument, Point 2 37

Conclusion 39

APPENDIX

(Numbered commencing with page 74a)

Answer to Amended Complaint . . 74a

Answered Interrogatories . . . 88a

Order Granting Motion to Compel . 90a

Response to Interrogatory #1 . . 92a

Petition for Writ of Prohibition
in District Court of Appeal,
Fourth District of Florida . . 93a

Statutes:
§ 86.091, Florida Statutes (1989) 118a

§ 194.011(1), F.S. (1989) . . 118a

§ 200.069(1), F.S. (1989) . . 118a

§ 194.011(3), F.S. (1989) . . 120a

§ 194.015, F.S. (1989) . . 120a

§ 194.034, F.S. (1989) . . 121a

§ 196.011(1), F.S. (1989) . . 122a

§ 196.193(5), F.S. (1989) . . 123a

§ 197.322(3), F.S. (1989) . . 124a

TABLE OF AUTHORITIES

Cases

Adams Construction Equipment Corp. v. Hausman, 472 So.2d 467 (Fla. 5th DCA 1985) 24

Burris v. Sewer Improvement District No. 147, 743 F.Supp. 655 (D.C. Ark. 1990) 31

Emley v. Indiana Department of State Revenue, 536 N.E.2d 558 (Ind. Ct.App. 1989) 30

Greene v. Lindsey, 456 U.S. 444, 102 S.Ct. 1874, 72 L.Ed.2d 249 (1982) 25

Hagar v. Reclamation Dist. No. 108, 111 U.S. 701, 4 S.Ct. 663, 28 L.Ed. 569 (1884) 14

Insurance Company of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982) 38

Kahn v. Shevin, 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974) 35

Madden v. Kentucky, 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590 (1940) . . 34

Mathews v. Eldridge, 424 U.S. 47, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) . 22

McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Department of Business Regulation of Florida, 495 U.S. ____, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990) 35

Mennonite Board of Missions v. Adams, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1982) 26

Mullane v. Central Hanover Bank & Trust Company, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed.2d 865 (1950) 26

North Laramie Land Co. v. Hoffman, 268 U.S. 276, 45 S.Ct. 491, 69 L.Ed. 953 (1925) 27

Ross v. Martin, 800 F.2d 808 (8th Cir. 1986) 12

Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988) 26

Volusia County v. Daytona Beach Racing & Recreation Facilities District, 341 So.2d 498 (Fla. 1976) . 24

Walters v. City of St. Louis, 347 U.S. 231, 74 S.Ct. 505, 98 L.Ed. 660 (1954) 34

Statutes & Rules of Court

Florida Rules of Judicial Administration, Rule 2.060(g) 38

§ 86.091, F.S. 2

§ 193.122(2), F.S. 16

§ 193.122(3), F.S. 16

§ 194.011(1), F.S. 14

§ 194.011(3)(d), F.S. 13, 15

§ 194.015, F.S. 13

§ 194.034, F.S. 14

§ 194.034(2), F.S. 14

§ 194.171(2), F.S. 2

§ 194.171(2), F.S. 10

§ 196.011, F.S. 12

§ 196.193(5), F.S. 12

§ 197.322(3) 3

§ 197.3635, F.S. 3

§ 200.069(8), F.S. 14

STATEMENT OF THE CASE

Petitioner will be referred to as "Abundant Life" and Respondent as Mr. Markham or the Property Appraiser. References in this Brief to Petitioner's Petition for Writ of Certiorari will be "P-(page number)". References to the Appendix to the Petition will be "App. (page number)a". Respondent's Appendix commences numbering at page 74a. All references herein to "F.S." refer to the Florida Statutes (1989). References to the "Circuit Court" are to the Circuit Court of the Seventeenth Judicial Circuit of Florida, a state trial court of general jurisdiction. References to the "District Court" are to the District Court of Appeal of Florida, Fourth District, an intermediate Florida appellate Court.

In the Courts below, Mr. Markham timely objected to consideration of

Constitutional challenges to the statute of nonclaim for Abundant Life's failure to join an indispensable party and to serve the Attorney General of Florida or State Attorney of the Seventeenth Judicial Circuit as required by § 86.091, F.S. § 194.181(5), F.S., provides that the State Department of Revenue must be a party Defendant to an action challenging an assessment on Constitutional grounds.

The Broward County Property Appraiser is not the correct party to defend the constitutionality of a Florida statute; he is a ministerial officer. This task properly belongs to the Florida Attorney General both in the trial Court and in this Court. Since Abundant Life failed to give the Attorney General the opportunity to make a record in the trial Court concerning the constitutionality of § 194.171(2), Florida Statutes, this Court

should not entertain a challenge to the statute's alleged unconstitutionality.

Mr. Markham is not the public official who should be defending a challenge to the form of the tax bill that is both prepared and sent by another officer of local government, the Broward County Revenue Collector. The Florida Legislature has prescribed the language of the tax notice in § 197.3635, F.S. and has forbidden the Revenue Collector from using any other form. § 197.322(3), Florida Statutes. Had the Revenue Collector been made a party, he would doubtless have addressed Abundant Life's assertion that the tax notices could include a statement of the date the tax rolls were certified, "at no cost and no effort by the Property Appraiser". (P-23)

SUMMARY OF ARGUMENT

As to Question 1: Mr. Markham actually mailed Abundant Life a written notice of denial of its claim for tax exemption on June 1, 1989. (See copy at App. 80a, 86a) The notice specifically advised Abundant Life of its right to review of the denial before an independent administrative tribunal. Later in 1989, Mr. Markham sent a second notice to all property owners in Broward County, which advised all taxpayers of any exemptions applicable for the year 1989. This notice advises all taxpayers of their rights to an administrative assessment challenge. Abundant Life did nothing in response to either notice.

Mr. Markham first certified the 1989 tax rolls for collection on October 17, 1989. This commenced the running of the sixty day period of nonclaim within which

Abundant life must file suit to contest Mr. Markham's denial of exemption. Mr. Markham published notice of certification in a large classified display advertisement in two newspapers, and posted the date in his office. Florida law provides that Abundant Life could have written to Mr. Markham, asking to be advised in writing of the certification date. It did not. Late in October or early in November, 1989, the Broward County Revenue Collector mailed a tax bill to Abundant Life. This tax bill also disclosed that exemption for that year was "$0". (App. 17a) Abundant Life had at least forty-five days within which it could have filed suit after it received this tax bill. This is the notice that Abundant Life claims to be deficient because it does not notify it of the existence of the sixty day statute of

nonclaim and the date the rolls were certified.

This Court must look at the entire tax process, not simply the contents of the last notice sent (the tax bill), in determining whether Florida law provides adequate due process of law to one whose claim for exemption has been denied. There is "zero" risk of an erroneous deprivation of Abundant Life's property interests through the procedures employed. Abundant Life simply refused to take advantage of them. Florida law thus satisfies the notice requirements of the Fourteenth Amendment to the Constitution.

Since Abundant Life challenges the form of the tax bill sent out by the Broward County Revenue Collector, rather than the notices sent by Mr. Markham, that official and the State of Florida,

Department of Revenue should have been responsible for defending whether this notice and the tax scheme of which it is part are constitutional. Neither official was a party in the courts below.

As to Question 2: Since the December 29, 1989 telephone call between counsel for Abundant Life and the Property Appraiser is alleged to have occurred after the sixty day statute of nonclaim expired, Abundant Life had already lost its judicial remedy. Even if counsel for the Property Appraiser had stipulated, parties to an action cannot confer jurisdiction on a court that otherwise lacks jurisdiction.

STATEMENT OF THE FACTS

Throughout its Petition, Abundant Life states as fact matters which were only allegations of its Amended Complaint. For example, it claims that its land was "... real property utilized by Abundant Life solely for purposes exempt under Florida constitutional and statutory law from ad valorem taxation." (e.s., P-5). Again, it states as fact, "...thus rendering the courts impotent in addressing issues such as estoppel, fraud, or misrepresentation on behalf of the Property Appraiser's office, such as occurred in this case." (e.s., P-14). Some statements, e.g., the assertion at P-28 that the Property Appraiser might not respond to a letter asking for notice of the tax roll certification date because the Property Appraiser's office is busy with administrative tax hearings before

the Property Appraisal Adjustment Board, have no record support. Mr. Markham's Answer to the Amended Complaint denied all allegations save Paragraph 2, admitting his status as Broward County Property Appraiser, and the fact that he denied Petitioner's claim for tax exemption. (See App. 74a - 87a for the full text of Respondent's Answer and Defenses.)

Once the case was at issue, Mr. Markham moved for Summary Judgment based on Petitioner's failure to file suit within sixty days of the certification of the tax rolls on October 17, 1989. Mr. Markham attached the Affidavit of Larry Nightingale, Clerk of the Property Appraisal Adjustment Board, who verified that Abundant Life did not file a petition with that Board in 1989. Even taking the allegations of its Amended Complaint as true, the action was dead on December 17,

1989 - well before the alleged telephone call between counsel for Abundant Life and counsel for the Property Appraiser on December 29, 1989. (App. 13a) At that time, Mr. Markham could have done nothing to confer jurisdiction on the Circuit Court.

Abundant Life attacks only one provision of the Florida Statutes, the 60-day statute of nonclaim contained in § 194.171(2), F.S.[1] That statute is part of a much larger statutory scheme. The system provides for plain, speedy and efficient administrative and judicial review of the Property Appraiser's decisions. This system has a myriad of due process protections built in.

---

[1]Abundant Life should doubtless have attacked § 197.3635, F.S., which prescribes the contents of the tax notice. § 197.322(3), F.S., proscribes the Revenue Collector from including any other language in the tax bill.

Abundant Life implies at P-5 and P-9a and actually states at P-21 that the first inkling it had that its property would be taxed for the year 1989 was an October or November, 1989 tax bill, copy reproduced at App. 17a. The tax notice is actually the very last step in the annual Florida tax assessment and collection cycle. Abundant Life has not informed this Court that before the tax bill was sent, the Property Appraiser sent it two previous official written notices concerning denial of its application for exempt status.

Especially after Mr. Markham notified Abundant Life that its application for 1989 exemption was denied, it was charged with notice of the procedures contained in Florida's tax statutes, including the time

limitations contained therein.[2]

§ 196.011, F.S., requires Abundant Life to file for tax exemption for its property prior to March 1 of each year. The Property Appraiser examines the application, and if it is his intention to deny it, notifies the applicant on or before July 1 of the year. § 196.193(5), F.S. This section requires that the notice specify the denied applicant's right to appeal the denial to the Property Appraisal Adjustment Board ("P.A.A.B." herein), an administrative agency

---

[2] *Ross v. Martin*, 800 F.2d 808 (8th Cir. 1986), cited at P-19, supports Mr. Markham's position. The Eighth Circuit held that due process of law was provided a taxpayer who was simply notified of his right to an administrative appeal without an encyclopedic explanation of the panoply of procedures available under Arkansas law. In Florida, as in Arkansas, once Mr. Markham notifies a taxpayer of the availability of an administrative remedy, due process of law is satisfied. *Id.* @ 812.

established by § 194.015, F.S. § 194.011(3)(d), F.S. provides that an applicant for exemption has thirty days from the Property Appraiser's denial in which to file a petition for administrative review of that denial to the P.A.A.B. That Board was authorized to grant Abundant Life complete relief and tax exemption for its property. Mr. Markham's Notice of Denial, reproduced at App. 86a, specifically advised Abundant Life of its right to appeal Mr. Markham's decision to the P.A.A.B. within thirty days of June 1, 1989, and even told it where to pick up the forms. Abundant Life apparently made a conscious decision not to pursue its administrative remedies. The P.A.A.B. administrative procedure accords a quasi-judicial, adversarial hearing and complete due process of law to one whose application for tax exemption

has been denied. § 194.034, F.S.. The Board is required to render a written decision containing specific findings of fact and conclusions of law. § 194.034(2), F.S.. This administrative remedy alone provides complete due process of law to Abundant Life, even if Florida's statutes did not provide a judicial remedy.[3]

The next protection Florida law accords a taxpayer is the "Truth in Millage" (TRIM) Notice. § 194.011(1), F.S. requires the Property Appraiser annually to send a TRIM Notice by first-class mail to each owner of real and personal property in the County. The form of this notice is prescribed by § 200.069(8), F.S.. The form specifically

---

[3] *Hagar v. Reclamation Dist. No. 108*, 111 U.S. 701, 4 S.Ct. 663, 28 L.Ed. 569 (1884)

notifies the taxpayer of any exemptions that have (or, as in this case, have not) been applied to its property, informs the taxpayer of the amount of taxes it paid in the previous year, and advises of the dollar amount of the present year's proposed taxes. By Mr. Markham's notifying Abundant Life that its assessed value was $2,638,410 and exemptions were "$0", it was given a second notice in writing that it had not been granted tax exemption, and was specifically advised of its administrative remedies. Nothing in our Record implies that Mr. Markham failed to carry out his responsibilities under the TRIM Law.

§ 194.011(3)(d), F.S., provides that a taxpayer has twenty-five days from this second notice to file a petition to review the assessment with the P.A.A.B. The same procedures apply as with the earlier round

of hearings. Once again, Abundant Life failed to avail itself of its plain, speedy and efficient administrative remedy provided by the Florida Statutes.

Florida law requires Mr. Markham to certify the rolls for collection to the County Revenue Collector twice each year. The "first certification" is made under § 193.122(2), F.S. (68a) and includes all parcels except those which were still before the P.A.A.B. as of the certification date. The "second certification" is made under § 193.122(3) after the P.A.A.B. has completed its hearings for the properties subject to hearings whose petitions had not been decided as of the date of the "first certification". Only the "first certification" triggers the sixty day statute of nonclaim in § 194.171(2), F.S.; those taxpayers whose petitions were still

before the P.A.A.B. have sixty days from the date of the decision of the Board in which to file a complaint in Circuit Court. (§ 194.171(2), F.S., App. 70a)

Mr. Markham executed the "first certificate" to the Broward County Revenue Collector on October 17, 1989. (App. 85a) This is the date on which Abundant Life's 60-day statute of nonclaim began to run. The P.A.A.B. completed its hearings, and Mr. Markham made the "second certification" on January 31, 1990. (App. 92a) Abundant Life urged the Circuit and District Courts to judicially re-write the nonclaim statute and to find that the "second certification" commenced the nonclaim period.[4]

Mr. Markham published a notice in two

---

[4]No Florida court has ever held that the "second certification" under § 193.122(3), F.S., starts the 60-day statute of nonclaim period.

newspapers of general circulation in Broward County - the Miami *Herald* (Broward Edition) and the Fort Lauderdale *News & Sun-Sentinel*, advising taxpayers of the fact and date of this certification. This is a display advertisement rather than fine print buried in the legal notices. (See App. 87a for copies of these notices.)

Since the certification date will vary from year to year, § 192.122(2), F.S., (App. 69a) provides that taxpayers who do not read the newspapers or visit Mr. Markham's office may be individually advised in writing of the date of the "first certification" by making a written request to the Property Appraiser. § 192.122(3), F.S., contains no such language as to the "second certification". (App. 69-70a) This is not surprising, since the "second certification" does not

commence operation of the statute of nonclaim. Abundant Life made no request to Mr. Markham under § 193.122(2), F.S. Abundant Life implies that it made such a request when it states at P-7:

> In April, 1990, Abundant Life requested that the Property Appraiser provide the dates of certification, which by statute is available to anyone who submits a written request, Fla.Stat. sec. 193.122(2), but the Property Appraiser refused to supply the date of second certification until ordered to do so by the Circuit Court.

The truth is that by April, 1990, Abundant Life had commenced its action in the Circuit Court. It argued in that Court that the Property Appraiser's second certification, made on January 21, 1990 under § 193.122(3), F.S., commenced the running of the statute of nonclaim. Abundant Life propounded Interrogatories to Mr. Markham as to the date of the "second certification". Mr. Markham

objected on grounds that this information was not evidence nor likely to lead to the discovery of admissible evidence, since the "second certification" does not trigger the running of the statute of nonclaim. (App. 88a-89a) The trial Court ordered Mr. Markham to respond (App. 90a) and he did. (App. 92a) None of this took place before Abundant Life's sixty day nonclaim period had expired.

Abundant Life was actually notified a third time that its property was going to be taxed for 1989, in plenty of time to file a lawsuit to contest the denial of its exemption. The final notice the taxpayer receives in a normal tax year cycle is the tax bill referred to at P-5. This is sent by another County official, the Revenue Collector, within 20 days of the Property Appraiser's "first

certification".[5] Again, Abundant Life sat on its rights and did nothing.

---

[5] § 197.322(3), Florida Statutes (1989).

ARGUMENT - POINT 1

Petitioner's first claim is that it received inadequate notice of the sixty day period within which could file a timely complaint to judicially contest Mr. Markham's denial of its property tax exemption. (P-17) It argues that the taxpayer must be sufficiently notified in the tax bill itself to alert it to substantial adverse consequences in the event of inaction, and that the tax bill does not contain any such notice.

Petitioner plays fast and loose with this Court when it states at P-19, "The only 'notice' given regarding the final assessed ad valorem real property tax is the tax notice itself".

This Court held in *Mathews v. Eldridge*, 424 U.S. 47, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) that "due process" is not a technical conception with a fixed

content, unlike some legal rules, and established a four part analytical scheme to determine whether a particular procedure satisfies due process. These factors are (1) The private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, (3) the probable value, if any, of additional or substitute safeguards, and (4) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id.* @ 335, 96 S.Ct. @ 903, 47 L.Ed. @ 33.

First, Abundant Life assumes that a tax exemption in Florida is a property right subject to protection by the Fourteenth Amendment. Mr. Markham questions whether a taxpayer has the

"right" to a tax exemption, and doubts that such is a protected property interest. Under Florida law, all property is presumed to be taxable and claims for exemption are construed strictly against the applicant. *Adams Construction Equipment Corp. v. Hausman*, 472 So.2d 467 (Fla. 5th DCA 1985), *Volusia County v. Daytona Beach Racing & Recreation Facilities District*, 341 So.2d 498 (Fla. 1976)

However, assuming for the sake of argument only that Abundant Life has a Constitutionally protected property interest, Florida has established procedures that negate the risk of an erroneous deprivation of such interest through the procedures used. The fundamental requisite of due process of law is the opportunity to be heard; furthermore, the right to be heard has

little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest, so that an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Greene v. Lindsey*, 456 U.S. 444, 102 S.Ct. 1874, 72 L.Ed.2d 249 (1982)

Once Mr. Markham actually notified Abundant Life of his intention to deny its claim for tax exemption and notified it of its administrative rights, Abundant Life had received sufficient personal notification to satisfy the second test in *Mathews, supra*, and this Court's holdings

in *Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed.2d 865 (1950), *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1982) and *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988).

This Court's decision in *Mullane v. Central Hanover Bank & Trust Co., op.cit.*, requires interested parties to be apprised only of the pendency of an action and to be afforded an opportunity to present their objections. *Id.* @ 314. Mr. Markham has satisfied this by sending a written notice to Abundant Life that its 1989 exemption application had been denied, coupled with information concerning the administrative remedies it could follow.

As an applicant for exemption, Abundant Life was charged with knowledge

of the ad valorem tax statutes pertaining to denied exemptions. It was actually advised of its rights to administrative redress. Once Mr. Markham did this, Abundant Life was charged with notice of all the Florida laws pertaining to administrative and judicial review of its exemption denial *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 45 S.Ct. 491, 69 L.Ed. 953 (1925).

Abundant Life would have this Court ignore the fact that in addition to the Property Appraiser's posting the date of tax roll certification in his office, and publication of a large advertisement with that date, Florida law offers the taxpayer the right to receive actual written notice of the date the sixty day non claim period begins to run. Abundant Life could have, but did not avail itself of this provision of law.

Tulsa Professional Collection Services, Inc. v. Pope, op.cit., does not govern this case, since Florida law requires the Property Appraiser to send an individual notice of denial of exemption to a claimant for exemption. It would apply if, for example, Florida law only required the Property Appraiser to publish notice of exemption denial. A decedent's creditor might well not know of his or her debtor's death, but an applicant for tax exemption is charged with the laws once the Property Appraiser has communicated notice of denial to it.

Abundant Life suggests that each of the hundreds of thousands of taxpayers in Broward County - many of whom are probably not sufficiently unhappy with their assessments to file a civil action - be sent personal notice of the "first certification". Because Abundant Life

failed to join the Revenue Collector and Department of Revenue in the trial Court, no record was developed there as to the probable value, if any, of additional or substitute safeguards, nor was any evidence of a cost-benefit ratio adduced by Abundant Life. There are no free notices. Abundant Life does not suggest who should bear the additional cost of this notification of hundreds of thousands of Broward County property owners, and to balance the benefit against the cost. Presumably, everyone whose application for exemption was denied and who is sufficiently irritated to file a lawsuit will read the statutes and alert themselves to the date of roll certification by reading the writing on the wall of the Property Appraiser's office, obtaining the information from the newspaper advertisements, or asking for

individual notice of this fact.

Abundant Life has not satisfied the fourth test in *Mathews v. Eldridge*, supra. It has not demonstrated that its interests outweigh the State of Florida's interest that assessment contest actions be promptly filed. *Tulsa* @ 489, *Mennonite* @ 798-799.

Interestingly enough, none of those cases explicitly require the notice to state the time within which the affected party must take action, but only to advise such party that its rights may be affected by a pending proceeding, and that it may wish to do something to protect them.

Abundant Life cites *Emley v. Indiana Department of State Revenue*, 536 N.E.2d 558 (Ind. Ct.App. 1989) at P-19, 20 for the proposition that a notice is inadequate if it does not sufficiently alert the taxpayer to substantial adverse

consequences in the event of inaction. The case holds precisely to the contrary. It first observed that *Mullane, op.cit.* requires an interested party to be notified of proceedings and be accorded an opportunity to object. The Indiana court rejected Emley's argument that the notice was defective because it did not advise him of the ultimate consequences of his failure to respond. "Notice of the pendency of proceedings to collect the taxes and an opportunity to be heard before obtaining the lien is sufficient." *Id.* @ 562.

Burris v. Sewer Improvement District No. 147, 743 F.Supp. 655 (D.C. Ark. 1990), cited at P-19, supports Florida's tax scheme. There, the property owners were simply notified by mail of the plan to form a sewer district. The notice referred the owners to the existence of

laws governing the formation and operation of the district. Notice of the annual assessment thereafter was made only by publication. This was held to be sufficient notice as against claims that notice of the annual assessment was insufficient. The District Court observed in a footnote at page 660 that the assessment process was not an isolated proceeding for which the District was required to give a direct notice by mail. The establishment, organization and assessment of Sewer Improvement District 147 was held to be one proceeding for which direct notice, in addition to publication notices, was given. In our case, one cannot view the tax bill in a vacuum; it is the culmination of one proceeding, the annual ad valorem tax cycle.

The argument at P-24 that Abundant

Life did not know whether it has an objection until the publication of the notice of certification of the tax rolls is difficult to understand, given the two previous notices Mr. Markham had sent to it that its exemption was denied.

The hypothetical situation raised at P-25 and 26 where a delay in mailing out the tax bills might work to the detriment of a taxpayer is not present in our case. Abundant Life had the third notice that it was going to be taxed in ample time to file a timely lawsuit to contest the denial of exemption. Likewise, since Abundant Life never asked Mr. Markham to be supplied with the date of certification, hypothetical delays in his response do not apply to this case.

This Court has frequently held that when a State legislature, acting within the scope of its authority, undertakes to

exert the taxing power, every presumption in favor of the validity of the action is indulged. Only clear and demonstrated usurpation of power will authorize judicial interference with legislative action. *Walters v. City of St. Louis*, 347 U.S. 231, 74 S.Ct. 505, 98 L.Ed. 660 (1954) The burden on one attacking the legislative enactment is to negate every conceivable basis which might support it. *Madden v. Kentucky*, 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590 (1940).

The Florida Legislature has enacted a sixty day statute of nonclaim to ensure that local governments have timely knowledge of lawsuits that might adversely affect their ad valorem tax revenues for that year. If actions were allowed to be filed months or even years later, such lawsuits would wreak havoc on the public purposes for which tax revenues had been

budgeted. This Court has specifically held that where taxation is concerned and no specific federal right apart from Fourteenth Amendment guarantees is imperiled, states have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation. *Kahn v. Shevin*, 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974).

This Court has frequently held that a State must provide procedural safeguards against unlawful tax exactions in order to satisfy the commands of the Due Process Clause. See, e.g., *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Department of Business Regulation of Florida*, 495 U.S. ____, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990). The denial of tax exemption does not create an unlawful tax. Florida has provided procedural safeguards

which satisfy the Fourteenth Amendment.

Abundant Life's real problem is not with the Property Appraiser nor with the Florida Statutes, but with its representatives who failed to take timely action to take administrative or judicial action when it had been notified of the availability of that action.

DISCUSSION - POINT II

At P-30, Abundant Life argues that in the December 29, 1989 telephone conversation alleged to have taken place between its counsel and counsel for the Property Appraiser, the Property Appraiser's counsel should have advised it of the time in which to respond, thereby denying it due process of law. Abundant Life's Amended Complaint alleged that this conversation took place on December 29, 1990. (App. 13a)[6] By December 29, 1989, Abundant Life had lost its rights to an action under § 194.171, F.S. It is horn book law that even if the parties agree, they cannot confer jurisdiction on a court that otherwise has no jurisdiction.

---

[6]The December 29, 1990 date in the Amended Complaint, served on June 1, 1990, is doubtless a typographical error; the correct date could only have been December 29, 1989.

Insurance Company of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982)

The Florida Rules of Judicial Administration, Rule 2.060(g), provides:

> No private agreements or consent between parties or their attorneys concerning the practice or procedure in an action shall be of any force unless the evidence of it is in writing, subscribed by the party or his attorney against whom it is alleged.

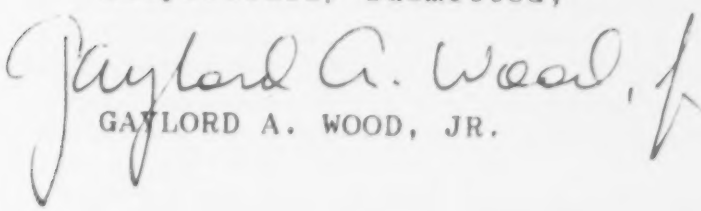
The type of agreement which Abundant Life alleged to exist, and which Mr. Markham denied existed, is thus specifically contrary to Rules promulgated by the Florida Supreme Court.

CONCLUSION

The Florida Legislature has provided for an applicant for tax exemption to receive three written notices from the Property Appraiser and Revenue Collector. In addition, the Property Appraiser also publishes notices of the date he certified the tax rolls for collection in two newspapers. He posts the same notice in the Property Appraiser's office. Any taxpayer who makes a written request of the Property Appraiser will be specifically advised in writing of the date of tax roll certification. This process abundantly provides for due process of law to an aggrieved taxpayer. The denial of a tax exemption in Florida presents taxpayers with opportunities for administrative and judicial challenges of the Property Appraiser's decision. The Florida Legislature's ad valorem tax

procedures minimize the risk of an erroneous deprivation of a taxpayer's property interest. This Court should deny the petition for writ of certiorari.

Respectfully submitted,



GAYLORD A. WOOD, JR.

No. 91-529

SUPREME COURT OF THE UNITED STATES

October Term, 1991

ABUNDANT LIFE CHRISTIAN CENTRE, INC.,

Petitioner,

-vs-

WILLIAM MARKHAM, as Broward County Property Appraiser,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

APPENDIX TO RESPONDENT'S BRIEF IN OPPOSITION

GAYLORD A. WOOD, JR.
Counsel for Respondent
304 S.W. 12th. Street
Fort Lauderdale, FL 33315
(305) 463-4040

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR BROWARD COUNTY CIVIL DIVISION

CASE NO. 90-09869 18

ABUNDANT LIFE CHRISTIAN CENTRE INC.,
Plaintiff ,

-vs-

WILLIAM MARKHAM, as Broward County Property Appraiser,

Defendant.

ANSWER AND DEFENSES OF DEFENDANT MARKHAM TO AMENDED COMPLAINT

Defendant, WILLIAM MARKHAM, as Broward County Property Appraiser, answers the Amended Complaint filed herein and say as follows:

1. Paragraphs 2 and the fact that the Property Appraiser denied exemption for the subject property as alleged in Paragraph 8, are admitted.

2. All the rest and remainder of the Amended Complaint not specifically admitted is denied.

WHEREFORE, having fully answered, Defendant MARKHAM prays that the Amended Complaint be dismissed, at Plaintiff's cost.

DEFENSES

As permitted by Rule 1.140(b), Fla.R.C.P., Defendant exercises the option to raise the following defenses in the Answer rather than by Motion to Dismiss:

3. *Lack of Jurisdiction over the Subject Matter.*

A. Plaintiff did not file a petition to the 1989 Property Appraisal Adjustment Board to contest the Property Appraiser's denial of exemption.

B. The Revenue Collector of Broward County requested that Broward County follow the "two certification" process provided for in Section 197.323, Florida Statutes, and the County Commission approved this recommendation.

C. Defendant Markham certified the 1989 tax rolls under Section 193.122(2),

Florida Statutes, on October 18, 1989. A true and correct copy of the Certificate to Roll is attached hereto as Exhibit "A" and incorporated by reference herein.

C. [sic] Since Plaintiff did not petition the Property Appraisal Adjustment Board for relief, no petition relating to the subject property was pending as of the date of this certification.

D. The "second certification" after the Property Appraisal Adjustment Board has completed its hearings is made according to Section 193.122(3), Florida Statutes, not Section 193.122(2). This "second certification" only reflects changes made by the Property Appraisal Adjustment Board and the Property Appraiser. Defendant Markham made no changes to the assessment of the subject property.

E. Section 194.171(2), Florida Statutes, requires that actions to contest assessments be filed within sixty (60) days

of certification of the tax rolls for collection ("First Certification") under Section 193.122(2), Florida Statutes. Said time expired December 18, 1989, and the Complaint in this action was not filed within said time limit. Accordingly, contrary to the allegations of Paragraph 7 of the Complaint, the action was not timely filed and a condition precedent to maintenance of this action has not been fulfilled.

F. Sec. 194.171(6), F.S., provides that the statute is a jurisdictional statute of nonclaim. This Court lacks subject-matter jurisdiction. *Markham v. Neptune Hollywood Beach Club*, 527 So.2d 814 (Fla. 1988), *Dade Drydock Corp. v. Broward County*, 250 So.2d 286 (Fla. 4th DCA 1971).

4. *Failure to join an indispensable party Defendant.* Plaintiff alleges that the assessment is contrary to the Florida Constitution in Paragraphs 10, 21 et seq. As provided in Section 194.181, Florida

Statutes, the official of state government responsible for overall supervision of the assessment and collection of taxes is an indispensable party.

5. The Amended Complaint fails to allege ultimate facts showing that the assessment is "void", as alleged in Count I. A tax assessment is "void" under three and only three very limited circumstances:

A. The assessment is not authorized by law.

B. The property is not subject to tax.

C. The taxing official has engaged in affirmative wrongdoing.

See *Dade County v. TAN Airlines*, 298 So.2d 570 (Fla. 3d.DCA 1974), cert.den. 305 So.2d 206 (Fla. 1974), holding a denial of exemption not to make an assessment "void".

6. Count II fails to state a cause of action by alleging that the Property Appraiser failed to consider the criteria found in Section 196.196, Florida Statutes.

Bystrom v. Whitman, 488 So.2d 520 (Fla. 1986) holds:

> We begin our analysis by noting the general proposition that the core issue in any action challenging a tax assessment is the amount of the assessment, not the methodology utilized in arriving at the valuation. *Homer v. Connecticut General Life Insurance Co.*, 213 So.2d 490 (Fla. 3d DCA 1968) An appraiser may reach a correct result for the wrong reason. *City National Bank v. Blake*, 257 So.2d 264 (Fla. 3d DCA 1972). Indeed, a taxpayer must carry a heavy burden in order to successfully challenge a tax assessment. A tax assessment carries a strong presumption of validity and, in order to prevail, the taxpayer must present proof that excludes every hypothesis of a legal assessment. *Blake v. Xerox Corp.*, 447 So.2d 1348 (Fla. 1984); *Straughn v. Tuck*, 354 So.2d 368 (Fla. 1977); *Powell v. Kelly*, 223 So.2d 305 (Fla. 1969).

7. Count III fails to state a cause of action. The public policy of the State of Florida is that all property is presumed to be taxable. Section 196.001, Florida Statutes. Grants of exemption are to be

construed strictly against the party applying for the same, and in favor of taxability of the property. *Adams Construction Equipment Corp. v. Hausman*, 472 So.2d 467 (Fla. 5th DCA 1985); *Daytona Beach Racing & Recreation District v. County of Volusia*, 372 So.2d 417 (Fla. 1979). Unless property clearly meets the strict ownership and use requirements of Chapter 196, Florida Statutes, it is not entitled to exemption.

8. Count IV fails to state a cause of action.

A. Defendant Markham sent Plaintiff a Notice of Denial of Exemption on June 1, 1989, a copy of which is attached hereto as Exhibit "B" and incorporated by reference herein. Said Notice informed Plaintiff that it had the right to contest the decision to the Property Appraisal Adjustment Board within thirty (30) days of the notice. Plaintiff failed to file such a petition.

B. Defendant Markham certified the 1989

tax rolls for collection on October 18, 1989. Notice of that fact was published in a newspaper of general circulation, the Fort Lauderdale Sun Sentinel, on or about October 19, 1989, as provided in Section 193.122(2), Florida Statutes, and a copy of the notice was posted in the Property Appraiser's office as provided in said statute. This statute provides that Plaintiff could have requested written notification of said date under this statute, but did not do so.

C. Defendant Markham sent a "Notice of Proposed Taxes" (TRIM) notice in August, 1989, showing the subject property to be taxable. Said notice was mailed according to Section 194.011, Florida Statutes. The notice advised Plaintiff that if it desired, it had twenty-five days to file a petition to contest the assessed value of the subject property.

D. All of the foregoing provides satisfactory protection to a plaintiff in an

ad valorem tax challenge. The vital interests of the taxing bodies of Broward County mandate a short statute of nonclaim so that suits cannot be filed months or years later which would adversely affect the public purposes for which tax revenues have been budgeted.

E. Plaintiff is charged with knowledge of the foregoing statutes, and has not pled sufficient facts to excuse compliance with the jurisdictional statute of nonclaim.

F. Plaintiff has not complied with the mandatory requirements of law relative to attempt to declare a statute to be unconstitutional.

9. Count V fails to state a cause of action for mandamus. As shown by Exhibit "B" attached, the Property Appraiser exercised the discretion vested in him by Chapter 196, Florida Statutes, and denied a tax exemption to the vacant land owned by Plaintiff. It is not a ministerial matter for which mandamus

is an appropriate remedy, to indirectly challenge the denial of a tax exemption.

10. Count VI fails to state a cause of action. Rule 2.060(g), Florida Rules of Judicial Administration, precludes any oral agreements between counsel unless made in open court. Plaintiff does not allege that a settlement agreement was made which can be enforced. Plaintiff has failed to allege all of the necessary elements of a contract, such as consideration, etc.

10. Count VII fails to state a cause of action. Estoppel does not lie against the State and its Constitutional officers such as the Property Appraiser. Plaintiff must allege (a) a representation as to a material fact that is contrary to a later-asserted position; (b) reliance on that representation and (c) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon. Plaintiff has failed to do so. See, *State*,

Department of Revenue v. Anderson, 403 So.2d 397 (Fla. 1981).

I HEREBY CERTIFY that a copy of the foregoing Answer to Amended Complaint and Defenses was served by mail this 8th. day of June, 1990, on E. SCOTT GOLDEN, ESQ., and LAW OFFICES OF PERRY W. HODGES, JR., Attorneys for Plaintiff, 644 S.E. 4th. Avenue, Fort Lauderdale, Florida 33301.

Law Offices Of
GAYLORD A. WOOD, JR.
FBN 087693
304 S.W. 12th. Street
Fort Lauderdale, Florida 33315-1521
Telephone 463-4040
Fax: 764-5734

By:__/s/ Gaylord A. Wood, Jr.____
Attorney for Defendant MARKHAM

DR-408
Rev. 7/77

CERTIFICATE TO ROLL

1989 Tax Roll

I, the undersigned, hereby certify that I am the duly qualified and acting Property Appraiser in and for Broward County, Florida; as such I have satisifed myself that all property included or includable on the Real (real, tangible personal) Property Assessment Roll for the aforesaid county is properly taxed so far as I have been able to ascertain; except as to parcels still before the Property Appraisal Adjustment Board that the said roll was certified and delivered to me by the Property Appraisal Adjustment Board on the 17th day of October, 19 89 ; and that all required extensions on the above described roll to show the tax attributable to all taxable property included therein have been made pursuant to law.

I further certify that upon completion of this certificate and the attachment of same to the herein described Assessment Roll as a part thereof, that said Assessment Roll will be delivered to the Tax Collector of this county.

In witness whereof, I have subscribed this certificate and caused the same to be attached to and made a part of the above described Assessment Roll this the 18th day of October, 19 89.

Property Appraiser of Broward

County, Florida

RECEIVED OCT 1 8 1989

WILLIAM MARKHAM
BROWARD COUNTY PROPERTY APPRAISER

Broward County Governmental Center
Room 111, 115 S. Andrews Avenue
Fort Lauderdale, Florida 33301-1886
Telephone: 357-6830

June 1, 1989

Abundant Life Christian Center, Inc.
1500 North State Rd 7
Margate, Florida 33063

With regard to your application for tax exemption on the subject property, we wish to advise that it has been acted upon as follows:

Totally Allowed _____

Partially Allowed _____

Denied 8230-17-020-Vacant Land

REMARKS: _____

_____

If you feel you are eligible for the amount denied, please contact our office at once to discuss this matter.

Please be advised that you have a right to APPEAL this decision to the Property Appraisal Adjustment Board. You have THIRTY (30) DAYS from the date of this notice to file a petition to said Board relating to this denial. Petitions for this purpose are available at our Main Office.

If you acquire by purchase, gift or lease, of if you dispose of by sale or rental any properties during the year, please notify this office.

This exemption is for 1989 only, and all future requests for renewals for exemption are required to be filed between January 1 and March 1 of each year.

Very truly yours,

Gail McConaghey

Gail McConaghey
Exemption Director

RECEIVED APR - 5 89

EXHIBIT B

For Fort Lauderdale News & Sun-Sentinel—As soon as possible

NOTICE OF CERTIFICATION OF TAX ROLL

Pursuant to Section 193.122, Florida Statutes, William Markham, Property Appraiser of Broward County, hereby gives notice that the Tax Roll for 1989, except as to parcels which are still before the Property Appraisal Adjustment Board, was certified to the Revenue Collector on the 18th day of October, 1989 for the collection of taxes.

William Markham, C.F.A., *Broward County Property Appraiser*

Miami Herald—Broward Edition—As soon as possible

NOTICE OF CERTIFICATION OF TAX ROLL

Pursuant to Section 193.122, Florida Statutes, William Markham, Property Appraiser of Broward County, hereby gives notice that the Tax Roll for 1989, except as to parcels which are still before the Property Appraisal Adjustment Board, was certified to the Revenue Collector on the 18th day of October, 1989 for the collection of taxes.

William Markham, C.F.A., *Broward County Property Appraiser*

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR BROWARD COUNTY CIVIL DIVISION

CASE NO. 90-09869 18

ABUNDANT LIFE CHRISTIAN CENTRE INC.,
Plaintiff ,

-vs-

WILLIAM MARKHAM, as Broward County Property Appraiser,

Defendant.

DEFENDANT MARKHAM'S NOTICE OF SERVICE OF ANSWERS TO PLAINTIFF'S FIRST INTERROGATORIES

Defendant, WILLIAM MARKHAM, as Broward County Property Appraiser, pursuant to Rule 1.140, Fla.R.C.P., hereby gives notice that Answers were served this date to the Interrogatories served on Defendant on April 26, 1990.

(Certificate of Service and Definitions omitted)

1. What is or was the date of first certification of the 1989 tax rolls for collection, and the date of second

certification of the 1989 tax rolls for collection:

Answer: First certification, October 18, 1989. As to second certification: Objection; not evidence nor likely to lead to admissible evidence since the second certification does not have any relevance to the commencement of the statute of nonclaim. See, Sec. 194.272(2) and 193.122(3), F.S.

(Interrogatories 2, 3, 4 and attest omitted)

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR BROWARD COUNTY CIVIL DIVISION

CASE NO. 90-09869 18

ABUNDANT LIFE CHRISTIAN CENTRE INC.,
Plaintiff ,

-vs-

WILLIAM MARKHAM, as Broward County Property Appraiser,

Defendant.

ORDER

THIS COURT having come on to be heard [sic], and the Court having heard argument of counsel and being otherwise advised in the premises, it is hereupon ORDERED and ADJUDGED that Plaintiffs' [sic] Motion to Compel Answer to Interrogatory No. 1 of Plaintiff's First Set of Interrogatories by [sic] and the same hereby is granted - 5 days. DONE and ORDERED in Chambers at Fort Lauderdale, Broward County, Florida this 21 day of

June, 1990.

W. Herbert Moriarty, Circuit Judge

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR BROWARD COUNTY CIVIL DIVISION

CASE NO. 90-09869 18

ABUNDANT LIFE CHRISTIAN CENTRE INC.,
Plaintiff ,

-vs-

WILLIAM MARKHAM, as Broward County Property Appraiser,

Defendant.

RESPONSE TO PLAINTIFF'S INTERROGATORY #1 AND CERTIFICATE OF SERVICE THEREON

Pursuant to the Order of this Court dated June 21, 1990, Defendant MARKHAM responds as follows to Interrogatory #1 of Plaintiff's Interrogatories served April 26, 1990:

The date of the Property Appraiser's Second certification of the Tax Roll for Broward County for the tax year 1989 was January 31, 1990.

(signed) William Markham

(Attest and certificate of service omitted)

IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

CASE NO. 90-2582

WILLIAM MARKHAM, as Broward County Property Appraiser,

Petitioner,

-vs-

ABUNDANT LIFE CHRISTIAN CENTRE, INC. and W. HERBERT MORIARTY, Circuit Court Judge,

Respondents.

PETITION FOR WRIT OF PROHIBITION
DIRECTED TO THE CIRCUIT COURT
FOR THE SEVENTEENTH JUDICIAL CIRCUIT

Law Offices of
GAYLORD A. WOOD, JR.
304 S.W. 12th Street
Fort Lauderdale, Florida 33315
(305) 463-4040

TABLE OF CITATIONS

CASES

Bystrom v. Diaz,
514 So.2d 1072 (Fla. 1987) . . 9,10

Cape Cave Corp. v. Lowe,
411 So.2d 887 (Fla. 2nd DCA 1982) . 7

Clark v. Cook,
481 So.2d 929 (Fla. 4th DCA 1986) . 8,10

Diaz v. Bystrom,
487 So.2d 1112 (Fla. 3rd DCA 1986) . 9

Gulfside Interval Vacations, Inc. v. Schultz,
479 So.2d (Fla. 2nd DCA 1985) . . 6,7

Markham v. Corlett,
453 So.2d 907 (Fla. 4th DCA 1984) . 8

Markham v. Hinckley,
544 So.2d 1130 (Fla. 4th DCA 1989) . 10

Markham v. Neptune Hollywood Beach Club,
527 So.2d 814 (Fla. 1988). . . 5,6

Old Republic Insurance Co. v. Whitworth,
442 So.2d 1078 (Fla. 3rd DCA 1983) . 2

School Board of Marion County v. Angel,
404 So.2d 359 (Fla. 5th DCA 1981) . 2

State ex rel. Pope v. Joanos,
278 So.2d 305 (Fla. 1st DCA 1973) . 2

State ex rel. Rash v. Williams,
302 So.2d 474 (Fla. 3rd DCA 1974) . 2

STATUTES AND TEXTS

Fla. Const. art. VII, section 3(a) . 2

Section 193.122, Florida Statutes . 2,12

Section 193.122(1), Florida Statutes. 11

Section 193.122(2), Florida Statutes. 3

Section 194.011, Florida Statutes . 12

Section 194.21, Florida Statutes . 6

Section 194.171, Florida Statutes 1,4,5,10

Section 194.171(2), Florida Statutes
. . . . 2,4,5,6,7,8,11

Section 194.171(3), Florida Statutes
. 4,5,6,7,8

Section 194.171(5), Florida Statutes
. . . . 4,5,6,7,9,10

Section 194.171(6), Florida Statutes
. . . . 4,5,6,7,8,9

Section 196.192(1), Florida Statutes. 2

Section 197.323, Florida Statutes 4,10,11

Section 197.323(1) Florida Statutes . 11

Chapter 194, Part I, Florida Statutes (1986)
. 3

Chapter 194 Part II, Florida Statutes (1987)
. 4

PREFACE

Respondent, Abundant Life Christian Centre, Inc., filed an action in the trial Court contesting the Property Appraiser's denial of exemption on a parcel of vacant land for the year 1989. Petitioner, William Markham, as Broward County Property Appraiser, asserts that the Circuit Court has lost its jurisdiction under Section 194.171, Florida Statutes. Mr. Markham contends that the Court exceeds its jurisdiction by refusing to dismiss the case for lack of jurisdiction and continuing the proceedings.

Respondent Abundant Life is the Plaintiff below and is the real party in interest. The petition is supported by the Appendix hereto. If this Court issues an order to show cause, a response should be required from the Plaintiff/property owner, Abundant Life Christian Centre, Inc.

JURISDICTION

William Markham, as Broward County Property Appraiser, seeks a writ of prohibition directed to the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, to prohibit the further exercise of jurisdiction by that court in the case of *Abundant Life Christian Centre, Inc. v. William Markham, as Broward County Property Appraiser*, 17th Circuit, Case No. 90-09869.

By order dated September 4, 1990, the Circuit Judge denied the Property Appraiser's Motion for Summary Judgment based on Lack of Jurisdiction. (A-1) In issuing that Order and thereby retaining the case in the trial Court, the Court exceeded its jurisdiction.

The purpose of prohibition is to permit a superior court to prevent an inferior court from exceeding its jurisidction. *School Board of Marion County v. Angel*, 404 So.2d 359 (Fla. 5th DCA 1981). Prohibition is a

confined writ designed to prevent a trial court from acting in excess of its lawful jurisdiction. *State ex rel. Rash v. Williams*, 302 So.2d 474 (Fla. 3rd DCA 1974); *State ex rel. Pope v. Joanos*, 278 So.2d 305 (Fla. 1st DCA 1973). It is the appropriate remedy to prevent a court from acting without jurisdiction. *Old Republic Insurance Co. v. Whitworth*, 442 So.2d 1078 (Fla. 3rd DCA 1983)

In the instant action, the trial Court has exceeded its jurisdiction by failing to dismiss Abundant Life's claim for relief on Mr. Markham's motion. Abundant Life filed suit on March 30, 1990 to contest Mr. Markham's denial of religious exemption on the property. It asserted, *inter alia*, that the Property Appraiser's denial of exemption on the property was contrary to the provisions of Article VII, Section 3(a), of the Florida Constitution and Section 196.192(1), Florida Statutes. It also alleged that its action was filed pursuant to

Section 194.171(2), Florida Statutes, i.e., within 60 days of the certification of the tax roll by the Property Appraiser. At hearing on the motion, the Property Appraiser presented evidence of, and the Court took judicial notice of, the fact that the tax roll was certified on October 17, 1989, more than 3 months prior to the time the action was filed. (A-2) The fact of that certification was published in a newspaper of general circulation pursuant to Section 193.122, Florida Statutes. (A-3) The Property Appraiser also presented the Affidavit of Larry Nightingale, Clerk to the Property Appraisal Adjustment Board, attesting to the fact that the taxpayer did not file a petition to the Property Appraisal Adjustment Board, the administrative body created by Chapter 194, Part I, Florida Statutes (1986) to hear claims for relief in ad valorem tax cases, prior to instituting its action in the Circuit Court, nor was its

cause ever heard by that Board. (A-4-5)

The Property Appraiser's Motion for Summary Judgment based on lack of subject matter jurisdiction was heard on August 30, 1990. Abundant Life attempted to defend on the Motion by presenting the Affidavit of E. Scott Golden, alleging reliance on its attorney's communication regarding the exemption with attorney for the Property Appraiser and asserting that the action was timely filed. (A-6-8) It also argued that the entire tax roll was recertified on January 31, 1990, and that this action was filed within 60 days of that certification. That Affidavit also stated that the taxpayer's representative contacted the Property Appraiser's office in December, 1989, (A-6), while it was first notified of the denial of exemption at least six months earlier on June 1, 1989. (A-9) Abundant Life indicated that the Affiant was never informed by Mr. Markham's attorney of the date on

which its time to file an action in the Circuit Court began to run. The Property Appraiser asserted that the taxpayer received proper notice of the certification of the tax roll, the action which begins the time in which to file pursuant to Section 193.122(2), Florida Statutes, as does any other taxpayer in the County. The Trial Court denied the Property Appraiser's Motion for Summary Judgment.

The question presented by this petition for writ of prohibition is:

> WHETHER THE TRIAL COURT ERRED IN DENYING THE MOTION FOR SUMMARY JUDGMENT BASED ON LACK OF SUBJECT MATTER JURSIDICTION AND IN CONTINUING TO EXERCISE JURISDICTION OVER THE SUBJECT MATTER WHERE THE PLAINTIFF FAILED TO COMPLY WITH THE MANDATORY JURISDICTIONAL REQUIREMENTS OF SECTION 194.171(2) and (6), FLORIDA STATUTES, (1987).

An action to set aside a tax assessment is unknown at the common law. It is a purely statutory proceeding governed by Chapter 194

Part II, Florida Statutes (1987). The relevant statute is Section 194.171, Florida Statutes (1987), which states:

194.171 Circuit Court to have original jurisdiction in tax cases. --

(1) The circuit courts have original jurisdiction at law of all matters relating to property taxation. Venue is in the county where the property is located.

(2) No action shall be brought to contest a tax assessment after 60 days from the date the assessment being contested is certified for collection under s. 193.122(2), or after 60 days from the date a decision is rendered concerning such assessment by the property appraisal adjustment board if a petition contesting the assessment had not received final action by the property appraisal adjustment board prior to extension of the roll under s. 197.323.

(3) Before a taxpayer may bring an action to contest a tax assessment, he shall pay to the collector not less than the amount of the tax which he admits in good faith to be owing. The collector shall issue a receipt for the payment, and the taxpayer shall file the receipt with his complaint.

(4) Payment of a tax shall not be deemed an admission that the tax was due and shall not prejudice the right of a taxpayer to bring a timely action as provided in subsection (2) to challenge such tax and seek a refund.

(5) No action to contest a tax assessment may be maintained, and any such action shall

be dismissed, unless all taxes on the property assessed in years after the action is brought, which the taxpayer in good faith admits to be owing, are paid before they become delinquent.

(6) The requirements of subsections (2), (3) and (5) are jurisdictional. No court shall have jurisdiction in such cases until after the requirements of both subsections (2) and (3) have been met. A court shall lose jurisdiction of a case when the taxpayer has failed to comply with the requirements of subsection (5).

Section 194.171, Florida Statutes, is a jurisdictional statute of nonclaim rather than a statute of limitations. *Markham v. Neptune Hollywood Beach Club*, 527 So.2d 814 (Fla. 1988). The instant case relates specifically to subsections (2) and (6). The taxpayer failed to file its action in the Circuit Court within 60 days of the certification of the tax roll pursuant to Section 193.122(2), Florida Statutes. Since the taxpayer filed no petition before the property appraisal adjustment board regarding his 1989 taxes, no decision was rendered by that Board. Therefore, the second portion of

subsection (2) concerning the date on which the Property Appraisal Adjustment Board rendered a decision regarding a petition to it is irrelevant.

The construction of subsection (2) as to the court's discretion is not an open issue. Effective July 1, 1983, subsection (6) was added to the statute, expressly making the requirement of subsection (2), (3), and (5) jurisdictional. In spite of the clear langauge of the statute, the trial court herein denied the Defendant's motion for Summary Judgment. In so doing, the trial judge exceeded his jurisdiction and should be prohibited from continuing with the case.

The relevant case law since the addition of subsection (6) to the statute is unanimous and unequivocal. Numerous cases at all appellate levels have upheld the legislature's intention that the trial court lose jurisdiction of a tax case where the taxpayer does not comply with each

requirement of the statute.

Markham v. Neptune Hollywood Beach Club, *supra* dealt with the very same issue as the instant one -- a Plaintiff's failure to comply with the 60-day filing requirement of subsection (2). In that case, the Supreme Court made a clear distinction between the old law, Section 194.21, Florida Statutes, which lacked the language of subsection (6), and the new statute. The case clearly states that case law under the old statute which treats subsections (2), (3) and (5) as statutes of limitations are no longer applicable. The Court stated:

As the Department points out, in *Lake Worth Towers* we referred to Section 192.21(2), Florida Statutes (1967) , the predecessor to section 184.171(2), as a statute of limitations. Then in *Coe v. ITT Community Development Corp.*, we recharacterized section 194.171(2) as a non claim statute and noted that our use of the term "Statute of Limitations" in *Lake Worth Towers* was the result of "an inartful use of the term." Finally in *Miller v. Nolte*, we expressly receded from our characterization of the statute as a nonclaim statute in *Coe* and held that "[d]ue process requires that section

194.171(2) be considered a statute of limitations." However, as pointed out by the *Gulfside* court, although *Miller* was released subsequent to July 1, 1983, the effective date of section 194.171(6), in *Miller* we were addressing a pre-1983 tax assessment and did not address the clear expression of legislative intent contained in subsection (6) that subsection (2) be considered a jurisdictional statute of nonclaim. By application of subsection (6), the trial court in the instant case lacked jurisdiction to consider the taxpayers' suit. Therefore the suit was properly dismissed. (citations omitted)

Id. at 815-816

The Court added a peripheral footnote which helps to clarify the legislative intent in enacting Section 194.171(6) as well as to point up the fact that actions of the property appraiser cannot constitute a basis for waiver or estoppel as to the effect of the statute. In footnote 6 the Court notes that Chapter 83-204, section 7, Laws of Florida, which enacted the new provision, was the legislature's response to and curative of *Cape Cave Corp. v. Lowe*, 411 So.2d 887, a 1982 decision out of the Second District

which held that Subsection 194.171(2) was a statute of limitations. The effect of the legislature's enactment of subsection (6) was to make subsections (2), (3) and (5) unequivocably jurisdictional statutes of nonclaim which the property appraiser cannot be estopped from claiming by his actions. An agreement of parties cannot confer jurisdiction on a court. *Id.* at 816 Therefore, the claim of the taxpayer herein that it was never notified of the running of the time to file in discussions with the Property Appraiser's representatives provides no basis for relief from the requirements of the statute.

The *Neptune* Court made its decision in accord with *Gulfside Interval Vacations, Inc. v. Schultz*, 479 So.2d (Fla. 2nd DCA 1985), another case wherein the basis for dismissal of the action was the jurisdictional requirement of Section 194.171(2), Florida Statutes. In *Gulfside*, the Court

distinguishes prior decisions which referred to that section as a statute of limitations, making clear that the addition of subsection (6) to the statute makes it a jurisdictional statute of nonclaim:

> ...[W]e cannot escape the plain meaning of the legislature; the legislature obviously intended to make the sixty-day requirement in subsection (2) a jursidictional statute of nonclaim. Therefore, by the application of subsection (6), the trial court lacked jursidiction to consider the appellants' suit and the action of the trial judge in dismissing their complaint with prejudice was correct.

Id. at 778

Clark v. Cook, 481 So.2d 929 (Fla. 1th DCA 1986) arose from a petition for a writ of prohibition, as in the instant action. In that case, the tax collector sought the writ to prevent the trial court from maintaining jurisdiction over a case where the taxpayer had brought suit, but had not made a good faith payment for taxes within the 60-day period as required by the related section 194.171(3), Florida Statutes. The plaintiff

made tender of the tax required under the subsection after the period required by that section. The court stated that the issue is not complex, holding that when there is a late tender of taxes, the cause could not survive the jurisdictional requirement of subsection (6):

> [T]he late tender could not breathe life back into the action, even were we to construe the statute so as to permit tender of payment, and refusal of tender, to be the equivalent of actual payment for the purpose of deciding a motion to dismiss.

Id. at 931

This court also noted in *Clark* that the trial court might have relied on decisions made prior to the 1983 addition of subsection (6) to the statute. It stated that such reliance was error.

Markham v. Corlett, 453 So.2d 907 (Fla. 4th DCA 1984), in an opinion less than one-half page long, reversed a lower court order and held that pursuant to Subsections

194.171(5) and (6), an action contesting a tax assessment is barred because the taxes in question were not paid before they became delinquent. In that case, the taxpayer had made a "good faith payment", but tax certificates were sold for the year in question. There, in late compliance with the related subsection, the taxpayer redeemed the certificates and argued that this restored the lower court's jurisdiction. However, this Court held that the trial Court lost jurisdiction the moment the taxes for the year in question became delinquent.

In *Bystrom v. Diaz*, 514 So.2d 1072 (Fla. 1987), the Supreme Court reversed a decision of the District Court of Appeal, Third District, *Diaz v. Bystrom*, 487 So.2d 1112 (Fla. 3rd DCA 1986), which found that failure to pay a subsequent year's taxes was not fatal to the action. In *Bystrom*, the Supreme Court cogently observed:

Although subsections 194.171(5) and (6) appear to be somewhat harsh, their meaning is clear. Subsection 194.171(5) plainly states that a taxpayer may not maintain a suit contesting a tax assessment, and that such an action "shall be dismissed, unless all taxes on the property assessed in years after the action is brought, which the taxpayer in good faith admits to be owing, are paid before they become delinquent." Subsection (6) expressly declares that these requirements are jurisdictional and that "[a] court shall lose jurisdiction of a case when the taxpayer has failed to comply with the requirements of subsection (5)." The statute does not allow a court to retain jurisdiction once taxes become delinquent. (e.s.)

Bystrom v. Diaz, *op. cit.*, at 1075

The Court went on to state that this requirement is not an undue burden on the taxpayer, but is a reasonable restriction on his rights as prescribed by law. This requirement was not found to be unreasonable in that it necessitates only that the taxpayer, as a prerequisite to keeping his suit alive, pay the undisputed amount of a subsequent year's taxes due prior to delinquency. *Id.* Herein, the only requirement is that the taxpayer file its court action within 60 days of a public act

of which it receives notice pursuant to statute. Such a requirement is necessary in order for the various taxing bodies in the County to be able to establish the amount of dollars available to them.

Most recently, in *Markham v. Hinckley*, 544 So.2d 1130 (Fla. 4th DCA 1989), this Court once again granted a writ of prohibition requiring dismissal of an action which violated the provisions of Section 194.171(5). This Court cited *Clark v. Cook*, *supra* and *Bystrom v. Diaz*, *supra* in finding once again that "the jurisdictional requirements of Section 194.171 must be strictly enforced." *Id.* at 1140

There is no question here that the trial Court lost its jurisdiction. Abundant Life argues that the second certification of the tax roll following the institution of the procedures called for in Section 197.323 is the act which began the running of the time to file. That assertion is incorrect.

In most of the smaller counties, all Property Appraisal Adjustment Board Hearings are completed prior to the certification of the tax roll by the Property Appraiser, and the tax roll is certified only once, for all properties in the county. However, in a large county such as Broward, it is not feasible to hold all hearings of the PAAB and render all decisions on contested properties prior to November 1 of the tax year. In those circumstances, pursuant to Section 197.323, Florida Statutes, the tax collector may request of the County Commissioners that the tax roll be extended and certified prior to completion of PAAB hearings. That certification, made prior to November 1, begins the 60-day time period in which an action may be filed for all properties, such as that of the taxpayer herein, on which there has been no petition to the PAAB and those properties for which a PAAB decision has been rendered prior to the time of

certification. Section 197.323(1), Florida Statutes In order for the PAAB to continue hearings beyond November 1, the tax roll is once again extended and a second certification is made at the conclusion of all PAAB hearings. Section 193.122(1), and 197.323(1) Florida Statutes The second certification, however, has no effect on the running of time in which to file suit. When the provisions of Section 197.323 are fulfilled, those properties for which a decision has not been rendered prior to the first certification of the tax roll have 60 days from the time a decision is rendered by the Board in which to file an action. Section 194.171(2), Florida Statutes.

In the instant case, there was no petition to the Property Appraisal Adjustment Board, and hence, no hearing. Therefore, the only provision of Section 194.171(2) which applies is the first part. The taxpayer's assessment was a settled matter by the time

the tax roll was certified on October 17, and no notice of a Board decision was applicable to his case. In any event, nowhere in the law is the second certification of the tax roll identified as an event which starts the running of time to file a civil action.

The taxpayer failed to follow the provisions of the statute. Abundant Life was privy to the information available to all taxpayers pursuant to Section 193.122, requiring that the Property Appraiser publish and supply notice of the certification date. There was no question as to whether the exemption had been denied, in that a Notification of Assessment and Taxes (TRIM Notice) was sent pursuant to Section 194.011, Florida Statutes, advising the taxpayer of the taxes due as well as a notice of denial of the application for exemption, informing each taxpayer whose application was denied of the right to a hearing before the Property Appraisal Adjustment Board. (A-9) Due

process was satisfied pursuant to statute, and the taxpayer was presumed to know the law. The foreseeable but unfortunate result is that the trial court now lacks jurisdiction to allow this action to continue. The property appraiser had a clear duty to follow the statute in moving to have the case dismissed. The trial court, in denying the Property Appraiser's motion, has now exceeded its jurisdiction.

CONCLUSION

The trial court's order of September 4, 1990 should be vacated and the trial court instructed to grant the motion for summary judgment based on lack of jurisdiction over the subject matter.

Respectfully submitted,

Law Offices Of
CAYLORD A. WOOD, JR.

By: _____
B. Jordan Stuart

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Prohibition and Appendix was served by mail this _____ day of September, 1990, on E. SCOTT GOLDEN, ESQ., and LAW OFFICES OF PERRY W. HODGES, JR., Attorneys for Plaintiff, 644 S.E. 4th. Avenue, Fort Lauderdale, Florida 33301, AND HON. W. HERBERT MORIARTY, Circuit Judge, Broward County Courthouse, Room 801, Fort Lauderdale, Florida 33301.

Law Offices Of
GAYLORD A. WOOD, JR.
304 S.W. 12th. Street
Fort Lauderdale, Florida 33315-1521
Telephone 463-4040
Fax: 764-5734

By: _____
Attorney for Defendant MARKHAM

§ 86.091, F.S., provides: "...If the statute, charter, ordinance or franchise is alleged to be unconstitutional, the Attorney General or the state attorney of the judicial circuit in which the action is pending shall be served with a copy of the complaint and be entitled to be heard.

§ 194.011(1), F.S., provides: (1) Each taxpayer whose property is subject to real or tangible personal ad valorem taxes shall be notified of the assessment of each taxable item of such property, as provided in s.200.069.

§ 200.069, F.S., provides: (8) Pursuant to s.200.065(2)(b), the property appraiser, in the name of the taxing authorities within his jurisdiction and at

the expense of the county, shall prepare and deliver by first-class mail to each taxpayer to be listed on the current year's assessment roll a notice of proposed property taxes, which notice shall be in substantially the following form. ...(8) The notice shall further read: Your property value as of January 1: Assessed value $____ Exemptions $_____, Taxable Value $_____ Last year's assessed value: $ (amount) . If you feel that the assessed value of your property is inaccurate or does not reflect fair market value, contact your county property appraiser at (phone number) or (location) . If the property appraiser's office is unable to resolve the matter as to market value, you may file a petition for adjustment with the Property Appraisal Adjustment Board. Petition forms are available from the

county property appraiser and must be filed ON OR BEFORE __(date)__.

§ 194.011(3)(d), F.S., provides: The petition may be filed, as to valuation issues, at any time during the taxable year on or before the 25th day following the mailing of notice by the property appraiser as provided in subsection (1). With respect to an issue involving the denial of an exemption, an agricultural classification application, or a deferral, the petition shall be filed at any time during the taxable year on or before the 30th day following the mailing of the notice by the property appraiser under ...s. 196.193...

§ 194.015, F.S., provides: There is hereby created a property appraisal adjustment board for each county, which

shall consist of three members of the governing body of the county as elected from the membership of the board of said governing body, one of whom shall act as chairman, and two members of the school board as elected from the membership of the school board...

§ 194.034, F.S. provides: (1)(a) Petitioners before the board may be represented by an attorney or agent and present testimony or other evidence. The property appraiser or his authorized representative may be represented by an attorney in defending his assessment or opposing an exemption and may present testimony or other evidence. The property appraiser, each petitioner, and all witnesses shall be required, upon the request of either party, to testify under oath as administered by the chairman of

the board. Hearings shall be conducted in the manner prescribed by rules of the department, which rules shall include the right of cross-examination of any witness. ...(2) The decision of the board shall contain findings of fact and conclusions of law and shall include reasons for upholding or overturning the determination of the property appraiser. When a special master has been appointed, the recommendations of the special master shall be considered by the board. The clerk, upon issuance of the decisions, shall, on a form provided by the Department of Revenue, notify by first-class mail each taxpayer, the property appraiser, and the department of the decision of the board.

§ 196.011(1), F.S. provides: Every person or organization who has the legal title to

real or personal property, except inventory, which is entitled by law to exemption from taxation as a result of its ownership and use shall, before March 1 of each year, file an application for exemption with the county property appraiser, listing and describing the property for which exemption is claimed and certifying its ownership and use...

§ 196.193(5), F.S. provides: In the event the property appraiser shall determine that any property claimed as wholly or partially exempt under this section is not entitled to any exemption or is entitled to an exemption to an extent other than that requested in the application, he shall notify the person or organization filing the application on such property of that determination in writing on or before July 1 of the year for which the

application was filed. All notifications must specify the right to appeal to the property appraisal adjustment board and the procedures to follow in obtaining such an appeal. Thereafter, the person or organization filing such application, or a duly designated representative, may appeal that determination by the property appraiser to the board at the time of its regular hearing. ...

§ 197.322(3), F.S., provides: Within 20 working days after receipt of the certified ad valorem tax roll and the non-ad valorem assessment rolls, the tax collector shall mail to each taxpayer appearing on said rolls, whose post-office address is known to him, a tax notice stating the amount of current taxes due from the taxpayer and if applicable, the fact that back taxes remain unpaid and

advising the taxpayer of the discounts allowed for early payment. Pursuant to s. 197.3632 the form of the notice of non-ad valorem taxes and the notice of ad valorem taxes shall be as provided in s. 197.3635 and no other form shall be used, notwithstanding the provisions of s.195.022. ...